

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8 VOLUME 1

9 Transcript of Combined Motions to Suppress
10 Proceedings and Daubert Hearings before The Honorable
11 James O. Browning, United States District Judge, Las
Cruces, Dona County, New Mexico, commencing on
December 18, 2017.

12
13 For the Government: Ms. Maria Armijo; Mr. Randy
Castellano; Mr. Matthew Beck

14 For the Defendants: Mr. Brock Benjamin; Ms. Cori
15 Harbour-Valdez; Mr. Patrick Burke; Mr. Robert Cooper;
16 Mr. Jeff Lahann; Mr. Orlando Mondragon; Mr. John
Granberg; Mr. Billy Blackburn; Mr. Scott Davidson;
17 Ms. Amy Jacks; Mr. Richard Jewkes; Ms. Amy Sirignano;
Mr. Christopher Adams; Mr. Marc Lowry; Ms. Theresa
18 Duncan; Ms. Carey Bhalla; Mr. William Maynard; Ms.
Justine Fox-Young; Mr. Donovan Roberts; Ms. Lisa
Torraco; Ms. Angela Arellanes; Mr. Jerry Walz

19
20 For the Defendants (Via telephone): Mr. James Castle
21
22
23
24
25

1 THE COURT: All right. Good morning
2 everyone. Let's grab a seat. It looks to me like
3 everybody has at least one attorney. So make sure
4 you look around, check for your co-defendants, and
5 make sure everybody has an attorney.

6 I don't think there is a big change in
7 attorneys from last week. I know, Mr. Villa, you're
8 on the telephone, and you will be gone this afternoon
9 and tomorrow; is that correct? Mr. Villa, are you
10 there? Got your mute button on? Mr. Villa? All
11 right. Well, that's what I understand his situation
12 is; is that correct?

13 MS. FOX-YOUNG: Your Honor, Mr. Villa is
14 going to call in for portions. He might just be
15 getting on momentarily.

16 THE COURT: All right. And I understand
17 Raquel, your paralegal, is going to be calling in?

18 MS. HARBOUR-VALDEZ: Yes, Your Honor.

19 THE COURT: Are you on the phone?

20 MS. RODRIGUEZ: I'm here.

21 THE COURT: All right. Ms. Rodriguez, good
22 morning to you.

23 Any other changes in counsel this morning?

24 All right. I understand from Ms. Wild and
25 Ms. Standridge that you have the same thing I have in

1 front of me, and that is the notice, the batting
2 order for this week. And so the only other thing I
3 know to mention to you is I think that Ms. Wild has
4 been in touch with you about the jury questionnaires,
5 putting those into your hands. So if there is any
6 questions on that, we can discuss it. Otherwise, I
7 assume Ms. Wild has discussed that.

8 Ms. Wild, you're on the phone as well this
9 morning; correct?

10 THE CLERK: I am, Judge.

11 THE COURT: Is there anything I should go
12 ahead and put on the record about the jury
13 questionnaires?

14 THE CLERK: I don't think so. I sent out
15 that email. So just to confirm they received the
16 email and the rolling production and the date set. I
17 don't have the information. I think it should be
18 accurate.

19 THE COURT: How long is the email?

20 THE CLERK: The email is not very long.

21 THE COURT: Why don't you go ahead and read
22 it into the record so it's in the record. You and I
23 have talked about it, but I think it would be good if
24 I heard it and everybody else and it's on the record.

25 THE CLERK: Sure. I sent an email this

1 morning to Ms. Armijo, Mr. Sirignano, and Ms.
2 Harbour-Valdez that stated the following:

3 "Good morning. Please let the parties know
4 that the juror questionnaires will be distributed
5 electronically to counsel for the Group 1 defendants
6 on a rolling basis, as follows: December 20 -- there
7 is a typo; it should say 2017 -- December 27, 2017,
8 and January 3, 2017 (sic). Please let me know if you
9 have any questions or concerns."

10 THE COURT: All right. Ms. Harbour-Valdez,
11 did you have anything you wanted to say on that?

12 MS. HARBOUR-VALDEZ: Your Honor, I hadn't
13 circulated that to the group yet. But now that it's
14 in the record, it's taken care of.

15 THE COURT: All right. Everybody knows.
16 Anybody have any comments on that? All right.

17 Thank you, Ms. Wild.

18 All right. What I think is originally
19 noticed for today is the defendant's motion for order
20 to show cause for noncompliance of district court
21 orders during the May 9 through the 10th hearings.
22 It looked like that was mostly yours, Ms. Sirignano.
23 Are you going to take the lead on it? What is left?
24 It looked like y'all were getting things resolved.
25 But tell me what issues are left for us to resolve.

1 Maybe we'll take them one at a time and deal with
2 them that way.

3 MS. SIRIGNANO: Good morning, Your Honor.
4 Amy Sirignano for Christopher Garcia.

5 THE COURT: Ms. Sirignano.

6 MS. SIRIGNANO: Mr. Lowry is going to take
7 the lead on this one.

8 THE COURT: All right. Thank you, Ms.
9 Sirignano.

10 Mr. Lowry.

11 MR. LOWRY: Thank you, Your Honor. I
12 conferred with the United States this morning, Your
13 Honor. I think your instincts are correct. We've
14 narrowed this down a bit. And I'm reading off of the
15 reply brief on page 2. With regard to the rough
16 notes, I believe that the United States has indicated
17 to us that they have preserved all the rough notes.
18 And they've indicated that they're considering them
19 to be Jencks material to be produced on the Jencks
20 timeline. I know that there is at least a handful
21 that we think may fall into the Brady, Giglio. I
22 didn't get a chance to speak with Ms. Armijo about
23 that. But it comes to mind, the February 19 debrief
24 with Eric Duran. So if we could just again request
25 that the United States do their Brady-Giglio review

1 for those materials, to see if there is exculpatory.

2 THE COURT: This is the Eric Duran 302?

3 MR. LOWRY: Yes, Your Honor. And there was
4 an audio-taped conversation, a sit-down at the FBI
5 office in Santa Fe that was associated with that.
6 That's been produced in full. I guess my concern is
7 the rough notes may indicate that there is more to
8 that meeting than the tape recorder captured. I
9 think, if I remember correctly, Ms. Armijo didn't
10 seem to think that that was the case. But I don't
11 have the luxury of looking at the rough notes to
12 understand that or not. So --

13 THE COURT: All right. Do you want to --
14 let's take these one at a time. Anybody else have
15 anything on that?

16 All right. Ms. Armijo.

17 MS. ARMIJO: Your Honor, I believe that
18 what we indicated was we would review all the --
19 there would be a review of the notes for
20 Brady-Giglio. I don't know that we agreed
21 necessarily that they would be disclosed. However,
22 they are being preserved at a minimum. I'll get
23 to -- and I think Mr. Lowry and I had briefly talked
24 about this right before court, and we had agreed to
25 kind of talk over a break to try and resolve some of

1 these issues, because there is a couple of things
2 that I had questions for him about. So that might be
3 a better use of our time, because most of it, I
4 think, is resolved, and we're working on a couple of
5 other issues.

6 THE COURT: Well, if it's Jencks material,
7 of course, what I've said in the past, you don't have
8 to disclose it till Jencks requires you to disclose
9 it. But if it is Brady or Giglio material, I take a
10 little different position than the Government does;
11 that needs to be turned over immediately. So if you
12 do you find some Brady and Giglio material in here,
13 Duran 302s or materials, then those need to be
14 produced immediately.

15 MR. LOWRY: Your Honor, I want to echo what
16 Ms. Armijo said. We had -- before court began this
17 morning, we were working constructively through what
18 few differences we have left. And I don't know if
19 the Court's preference is to hold off on this to
20 maybe right after the lunch break.

21 THE COURT: All right. Why don't we do
22 this: Unless somebody has an objection, we'll put it
23 aside, and see if y'all have any disputes. If there
24 are disputes, I'll put it on you, Mr. Lowry and Ms.
25 Sirignano, to tell the Court. Otherwise, I'll assume

1 all the disputes have been resolved here. And y'all
2 tell me if you don't have it, you'll bring it back
3 up.

4 MR. LOWRY: Thank you, Your Honor. If
5 necessary we'll bring it right back after the lunch
6 hour.

7 THE COURT: All right. I understand the
8 next portion of the hearing will be the resuming of
9 the presentation of evidence and argument on the
10 motion to suppress involuntary statements. This is
11 1294 and 1295. Are these the two we're taking
12 together?

13 MS. FOX-YOUNG: Yes, Judge.

14 THE COURT: All right. So who has got
15 presentation of evidence? Do you have it, Ms.
16 Fox-Young?

17 MS. FOX-YOUNG: Your Honor, for Mr. Perez
18 we have no further witnesses.

19 THE COURT: All right. Mr. Maynard, do you
20 have witnesses you want to present?

21 MR. MAYNARD: Your Honor, we've discussed
22 whether to present witnesses, or in lieu of a
23 witness, an affidavit. And I would like to present
24 in support of Mr. Herrera's motion to suppress the
25 affidavit as an exhibit, the affidavit which is

1 attached to the motion itself regarding the
2 conditions of -- the segregation conditions that he
3 was in, and receipt of Suboxone from Mr. Cordova in
4 support of a motion to suppress.

5 THE COURT: All right.

6 MR. MAYNARD: And that's the end of our
7 evidence. We rest.

8 THE COURT: All right. What is this going
9 to be marked as, as an exhibit in this hearing?

10 MR. MAYNARD: I need to talk to counsel and
11 see if --

12 MS. BHALLA: I believe it's J.

13 MR. MAYNARD: CH-J.

14 THE COURT: All right. Help me out, Ms.
15 Bhalla. Is that where you were on the hearings for
16 the 1294 and 1295?

17 MS. BHALLA: I believe so, Your Honor.

18 THE COURT: I have that as your next
19 exhibit; correct?

20 MS. BHALLA: Yes, Your Honor.

21 THE COURT: Ms. Standridge, do you agree
22 with that?

23 THE CLERK: Yes.

24 THE COURT: All right. Any objection to
25 that from any other defendants?

1 How about you, Ms. Armijo?

2 MS. ARMIJO: No, Your Honor.

3 THE COURT: All right. So Carlos Herrera's
4 Exhibit J will be admitted into evidence.

5 All right. Any further witnesses or
6 evidence, Mr. Maynard?

7 MR. MAYNARD: No, Your Honor.

8 THE COURT: How about any other defendants?
9 Anybody else have anything on 1294, 1295 they want to
10 present?

11 All right. Ms. Armijo, does the Government
12 have rebuttal evidence or evidence it wishes to
13 present?

14 MS. ARMIJO: We do not.

15 THE COURT: All right. Are the defendants
16 ready to argue the motion? Ms. Fox-Young?

17 MS. FOX-YOUNG: Thank you, Your Honor.

18 THE COURT: Ms. Fox-Young.

19 MS. FOX-YOUNG: As the Court heard in Mr.
20 Perez' opening argument -- and the Court is well
21 aware and familiar with the standard -- it is the
22 Government's burden to prove the constitutionality of
23 any statements made by Mr. Perez, the statements at
24 issue in this case.

25 The Court knows that a finding of coercion

1 does not depend -- need not depend upon actual
2 violence by a Government agent, and that a credible
3 threat is sufficient, and that that threat might be
4 mental or physical. And that comes from Fulminante,
5 which of course we cite, at 49 U.S. 279, at 287.

6 Without rehashing everything that we
7 briefed, and the information that's contained in our
8 pleadings, I would just like to draw the Court's
9 attention to some of the evidence that came out in
10 the course of the hearing. The Court heard first
11 about Mr. Perez' health -- not first in the hearing,
12 but it's a critical factor -- the Court heard from
13 Dr. Brislen, who at the end of our hearing on
14 Wednesday described Mr. Perez as extremely fragile.
15 She talked about the documentation, the evidence of a
16 series of physical traumas to Mr. Perez, the multiple
17 organ system problems that he had at the time of
18 February 2016, his persistent and uncontrolled
19 seizures, a low IQ that he had had documented since
20 childhood, anxiety, severe pain for which he took
21 tramadol and gabapentin. She talked about his
22 seizure medication, which was changed in January of
23 2016, right before the statements that he made to
24 Billy Cordova, and talked about how it wasn't
25 tapered, and should have been. Also talked about his

1 diabetes, abdominal problems, and other psych
2 disorders.

3 Clearly, Mr. Perez' physical and mental
4 health was well evident to the Corrections
5 Department. He had a walker outside his cell. And
6 the Court heard from Physician's Assistant Martinez
7 who said that he saw Mr. Perez approximately twice
8 weekly during this time for various maladies. He was
9 taken to and from those appointments by correctional
10 officers.

11 The Court also knows that Mr. Perez had
12 been in segregation all told at PNM, was a total of
13 10 months. He had been there since the summer of
14 2015. And prior to that, he was held in segregation
15 at another facility. But he had been in segregation
16 at PNM Level 6 since June of 2015. The Court heard
17 that that was not pursuant to the Department's
18 policy, which is only instructive insofar as it
19 demonstrates that the Department was looking for
20 reasons to hold Rudy Perez, reasons contrary and
21 outside of policy, to hold Rudy Perez so that they
22 could extract statements from him. And, you know,
23 the Court will see that in the Government's response,
24 the Government says Mr. Perez was not specifically
25 targeted to be placed in restrictive housing. He was

1 held there because he needed a handicapped cell,
2 because he was an SNM member, because he'd had
3 discipline. There is no documentation of this.

4 What there is documentation of is that well
5 over a year after the Department had closed the books
6 on the Molina investigation, they shipped Mr. Perez
7 to Santa Fe and held him at PNM, and had no
8 justification for it. He didn't have a hearing.
9 There was no credible threat as required by -- and I
10 don't have the exhibits in front of me, if the Court
11 would like to go through them -- but as required by
12 the Corrections Department policies. They just held
13 him there because they wanted to put him in a corner
14 cell next to Billy Cordova and work to extract
15 statements.

16 The Court heard from Mr. Roark about the
17 deleterious effects of holding somebody in
18 segregation. And I know the Court has heard various
19 other cases in the criminal and civil context, and
20 probably could take judicial notice of the effects of
21 living in solitary, with little to no rec, no access
22 to other people, to sunlight. The Court saw the cell
23 where Mr. Perez was housed in the video. And just
24 very limited stimulation for weeks and weeks and
25 weeks on end.

1 So at the time, then, that the Government
2 places Mr. Billy Cordova, who had been opened as an
3 informant and was acting as a government agent, in a
4 cell next to Mr. Perez, the Government has already
5 primed Mr. Perez to do what they want -- I mean, they
6 want to extract statements. The Court heard from
7 Agent Acee that Mr. Cordova was instructed to record
8 statements and he said to get bodies, to get whatever
9 he could in order to get that information for
10 Mr. Acee.

11 I think Billy Cordova's testimony was very
12 illuminating for the Court. One of the first things
13 he talked about were the pressure points that he used
14 to get Rudy Perez to talk. And he said, Your Honor,
15 he confirmed absolutely the SNM was going to move on
16 Rudy Perez. He said to this Court, "they were going
17 to move on him," meaning they were going to kill Rudy
18 because they thought that he was cooperating at the
19 time.

20 And he explained -- and for background, the
21 first indictment in this case was in November 2015.
22 Mr. Perez was not indicted. And so rumors were
23 swirling around the prisons. Cordova testified that
24 within days they knew the piece came from a walker,
25 and they assumed it was because Rudy talked, that's

1 why SNM members, including Billy Cordova, thought
2 that piece must have come from -- they thought that's
3 why the Government knew where the piece came from.
4 Everybody suspected Mr. Perez. Mr. Perez knew it,
5 and Billy Cordova knew it. And that is the main
6 pressure point, in Billy Cordova's language, that he
7 used to extract statements.

8 Mr. Cordova had every reason to do anything
9 he could to get Mr. Perez to talk. He was getting a
10 get out of jail free card from Agent Acee on the RICO
11 case. Agent Acee made it very clear that Agent Neale
12 was going to stop compiling overt acts against Billy
13 Cordova if he cooperated, if he got statements.

14 I think the Court can also deduce from Mr.
15 Cordova's testimony that he really can't be trusted.
16 Agent Acee talked about how he had to close him as an
17 agent because he couldn't follow the rules and he
18 couldn't be controlled. And the Court should take
19 that into consideration.

20 Next, the Court heard ample evidence, after
21 all of the evidence of Mr. Perez' frailty, his
22 situation, mental and physical, in February 2016,
23 this agent of the Government, Billy Cordova, gives
24 him Suboxone.

25 Now, Billy Cordova, of course, denied that

1 on the stand. And the Government will argue that
2 there is no proof that he did provide it. The Court
3 heard on cross-examination that Cordova said he was
4 never asked by the Government whether he had given it
5 to Rudy, and didn't know it was the subject of a
6 hearing. He wouldn't cop to giving him Suboxone when
7 he was on the stand, but he knew everything about
8 Suboxone. The Court heard him talk about using it in
9 every facility except for he says didn't use it in
10 Clayton. He talked about how he fished a line, how
11 he would fish a line, how he had fished lines through
12 the vents of the cells. He walked through the video
13 from PNM and said exactly how it was done. How much
14 it took to get high, when he would take it, how you
15 would get it. He knew in and out everything there
16 was to know about Suboxone, and freely admitted that
17 he would use it, and he would share it if he had it.

18 The Court heard from Mr. Perez, of course,
19 who testified credibly that he had been given it, and
20 he had taken it on multiple occasions when he talked
21 to Billy Cordova.

22 The Court also heard from Dr. Edward
23 French, who testified both in direct and on cross
24 about the effect that Suboxone could have on
25 overbearing someone's will. I think Ms. Armijo asked

1 him directly if that was possible. And he said,
2 Absolutely, reduces judgment, reduces executive
3 function. I think, when you look at Rudy Perez and
4 the state that he was in, the time that he had spent
5 in seg, the time -- or the numerous and escalating
6 physical and mental conditions that he had, then he's
7 given Suboxone, I think clearly could overbear his
8 will. And it did.

9 I think when the Court looks at the
10 standard from Fulminante, and the Fulminante case
11 itself, the facts here really do parallel that case.
12 They come about as close as you can come to
13 Fulminante, given the circumstances here.

14 I'll note that the Tenth Circuit in United
15 States versus Gonzales; that's 164 F.3d 1285, at
16 1289, has discussed the relevant factors that courts
17 have identified in considering whether or not there
18 is coercion. Those include the suspect's age,
19 intelligence, and education, the length of detention
20 and questioning, the use or threat of physical
21 punishment, and whether Miranda warnings were given,
22 and the accused's physical and mental
23 characteristics, the location of the interrogation,
24 and the conduct of the police officers. One by one,
25 you know, the Court heard about Mr. Perez' age,

1 intelligence, and education, and his extreme
2 debilitating physical conditions, his mental state.
3 He had been in seg for a long period of time, which
4 clearly had consequences and effects for him; the
5 conduct of the Corrections Department and the FBI and
6 Billy Cordova all working together to extract these
7 statements from him; the where he was placed; the
8 fact that he was placed in a cell where he could only
9 talk to Cordova, all really significant.

10 And you almost can check every box when you
11 look at these factors that have been identified. I
12 think this is absolutely a clear, almost textbook
13 case of coercion under those cases.

14 The Court will likely remember the facts
15 from Fulminante, where the Supreme Court affirmed the
16 Arizona Supreme Court. In that case, a prisoner had
17 confessed to a fellow inmate who was a paid
18 informant. The prisoner, the defendant there, had
19 been in prison in New York, and he was befriended by
20 the CI. The CI learned that he was a suspect in the
21 murder of his 11-year-old stepdaughter in Arizona.
22 And the CI told him, Look, I'll protect you from
23 other prisoners who have learned about the fact that
24 you're a suspected child killer, if you'll tell me
25 about the murder. And he did. And he did it for

1 protection. The CI then reported the confession to
2 police. And Fulminante was charged. At trial, the
3 court denied his motion to suppress, and he was
4 convicted. And he was sentenced to death. The
5 Supreme Court, on hearing this, explained that
6 because that CI's offer of protection was based on a
7 credible threat of violence, Fulminante's will was
8 overborne in such a way as to render his confession
9 the product of coercion. And then the Court didn't
10 rely on these factors in that case, but talked again
11 about low intelligence, lack of education, small
12 stature, and feelings of vulnerability.

13 Mr. Perez, when you look at all these
14 factors that form the context for where he was in
15 February 2016, when he made these statements, he
16 absolutely was vulnerable. And it was that threat,
17 Billy Cordova saying they were going to move on him,
18 that was in his mind, among other things, when he
19 made the statements. Cordova knew that he could get
20 him to say virtually anything because he couldn't
21 protect himself. He couldn't defend himself. Mr.
22 Perez was largely immobile. He was very sick. He
23 knew that -- and as he told the Court, Billy Cordova
24 had a big mouth, and he would protect him if he gave
25 him what he needed. And that's exactly what he did.

1 The Court I think is also well aware of the
2 Guerro, G-U-E-R-R-O, decision; that's Tenth Circuit,
3 983 F.2d 1001 at 1002. That's a case from 1993. And
4 the Government cites it. The Guerro court found that
5 the police must overreach by exploiting a weakness or
6 a condition known to exist in order to find coercion.
7 That's exactly what happened here.

8 And I think the Government -- we'll see
9 what they have to say, but I think they'll likely
10 argue that, Look, Corrections Department put Rudy
11 Perez where they put him. The FBI didn't know. And
12 Billy Cordova just popped up in Level 6, and this
13 just happened. That's not the way it works. All
14 those entities and Mr. Cordova were working together
15 as government agents, and they exploited the
16 weaknesses and vulnerabilities in Mr. Perez, knowing
17 that there were rumors that he was cooperating, and
18 knowing that he feared for his life.

19 And that, Your Honor, is precisely what
20 makes the extraction of these statements coercive --
21 in our briefing we cite to -- I've given you
22 Gonzalez -- I think the Court in Tafoya looked
23 closely at this issue. That's your case, Your Honor.
24 Of course, in Tafoya, the individual was Mirandized.
25 And all the cases point out that that's pretty

1 significant. Here, of course, Mr. Perez wasn't. But
2 I think if the Court looks to the cases that you
3 cited in Tafoya, they are also instructive. I'll
4 also point the Court to Beecher versus Alabama case,
5 where the Supreme Court held that the confession of a
6 prison escapee, accused of rape and murder was
7 involuntary, when he was questioned by investigators
8 in an infirmary while he was under the influence of
9 morphine for a gunshot he sustained. The court heard
10 from Mr. French that Suboxone is stronger than
11 morphine. And the cocktail that Mr. Perez was on, I
12 think, clearly makes the statements involuntary.

13 And unless the Court has any specific
14 questions, I will respond in a reply.

15 THE COURT: I don't believe I have any at
16 this time. Thank you, Ms. Fox-Young.

17 Mr. Maynard, Ms. Bhalla, do you have
18 argument on Mr. Herrera's part?

19 THE COURT: Ms. Bhalla.

20 MS. BHALLA: Thank you, Your Honor. I'll
21 try to keep it brief. I think that Ms. Fox-Young did
22 a good job going over the case law.

23 You know, Your Honor, I think it's
24 interesting that some of the testimony was that they
25 didn't know why these guys were in seg, or that it

1 was part of the investigation. The policy, when you
2 look at it, is pretty clear that they have to have a
3 real, justifiable reason why these guys were put in
4 administrative segregation.

5 And I think that the evidence that we've
6 submitted through the records shows that after the
7 Molina homicide, Mr. Herrera was put on lockdown from
8 the time of the homicide onward. They're still in
9 administrative seg. And that is absolutely a tool
10 that the Government can use to prime the pump to get
11 people ready to make statements.

12 One of the things I find the most
13 interesting about that argument is when you look at
14 the internal documents regarding Mr. Herrera, you see
15 that there were no articulable safety threats in any
16 of the other documents. In fact, his classification
17 records indicated that he had no gang activity for
18 the past 10 years, and there were no active security
19 threats on his file, which tells you that that wasn't
20 done as part of the investigation into the Molina
21 homicide. It was done for a specific purpose and for
22 a specific reason.

23 Mr. Cordova testified that drugs are life.
24 At first, he denied having this conversation with
25 Special Agent Acee. But later, he admitted to him

1 that when Special Agent Acee brought him in to talk
2 to him before he was put in the cell next to Mr.
3 Herrera and Mr. Perez, Look, drugs are life. And
4 Special Agent Acee testified that he doesn't recall
5 giving him any special instructions not to use drugs
6 when he was placed next to Mr. Herrera, even though
7 Mr. Cordova told Mr. Acee, and Mr. Acee was aware of
8 the use of drugs.

9 And I want to think about, or draw the
10 Court's attention to what happens in a typical
11 controlled substance bust. When you've got an agent
12 working with an undercover person; they go to buy
13 drugs, they get searched. They search them. They
14 make sure they don't have any other money, they make
15 sure they don't have any other drugs, they make sure
16 it's a clean site, they send them, they do the bust,
17 they come back and then they make the arrest. None
18 of that happened here. And it happened for a reason.
19 They didn't search Cordova. They didn't make sure he
20 wasn't using drugs. They weren't checking his tape
21 or checking the recording out to make sure that there
22 were no tools of coercion being employed. They
23 turned a blind eye to it because it was beneficial to
24 them. And there is no doubt that Cordova was working
25 as an agent for the Government.

1 I'm going to ask the Court to really take a
2 look at the transcripts that we admitted during this
3 hearing, and to look at Mr. Herrera's statement, and
4 to look at the number of inaudibles and the number of
5 stutters, and the number of times he's nonresponsive.

6 The evidence in the transcripts, where Mr.
7 Cordova is talking about how much he can get drugs
8 for, about purchasing drugs, about giving those drugs
9 to the people who were next to him in the cells.

10 There is ample evidence for the Court to find that
11 this was happening and that this was going on, and
12 that Mr. Herrera was impaired at the time he made
13 those statements, just by looking at the transcripts.
14 And Special Agent Acee himself testified that that
15 would be something he would consider as a DRE
16 officer: A person's ability to comprehend,
17 understand, and respond to questions.

18 One thing that Fulminante and these other
19 cases talk about, one of the major reasons we have --
20 we have limits on this. And one of the reasons the
21 Court should look at suppressing this is to prevent
22 future violations of the Constitution. And that's
23 the question I have, you know, for the Court: Is
24 this how we want to do business? Do we want to be
25 putting informants next to people and allowing them

1 to give drugs to defendants who have been in
2 lockdown, who have been isolated, who have been
3 deprived of pretty much anything resembling a normal
4 life, give them drugs so that they can get
5 statements? Is this how we want to do business? And
6 I would pose that the answer to that question is no.

7 And I would ask the Court to look at the
8 transcripts, to look at Mr. Herrera's affidavit, to
9 look at the documents that prove that NMDOC had no
10 reason to put these guys on lockdown, and to suppress
11 the statements.

12 Does the Court have any questions for me,
13 Your Honor?

14 THE COURT: Not at this time. I appreciate
15 it, Ms. Bhalla.

16 MS. BHALLA: Thank you, Your Honor.

17 THE COURT: All right. How about any of
18 the defendants? Do y'all want to speak on these two
19 motions to suppress by Mr. Herrera and Mr. Perez,
20 from the defendants?

21 All right. Mr. Beck, are you going to
22 handle the argument here?

23 MR. BECK: Yes, Your Honor.

24 THE COURT: Mr. Beck.

25 MR. BECK: I think it's important to look

1 first at Mr. Perez. And Your Honor was able to view
2 Mr. Perez on the stand. And it's important to look
3 what was in the motion, versus where we've come to
4 today.

5 The first thing in the motion was the
6 statements are not voluntary and not intelligent,
7 because Mr. Perez was under the influence of Suboxone
8 provided to him by Mr. Cordova. You heard Mr.
9 Cordova get up on the stand and say he didn't do so.
10 You heard Mr. Perez contrary to that.

11 But I want the Court to look at
12 cross-examination of Mr. Cordova, because Mr. Villa
13 brought out from Mr. Cordova that Mr. Cordova was a
14 soldier, and that he was known for talking a lot.
15 And indeed, Mr. Perez was intelligent enough,
16 although purportedly under the influence of Suboxone
17 and couldn't give voluntary or intelligent
18 statements, but yet was intelligent enough to know
19 that he could use Mr. Cordova to spread rumors
20 amongst everyone else in prison that he wasn't a rat.
21 So that gets rid of the not voluntary, not
22 intelligent. Mr. Perez said that same thing on the
23 stand. He said he knew Mr. Cordova was a soldier, he
24 knew he talked a lot in the prisons. And Mr. Perez
25 could use Mr. Cordova to spread rumors around him to

1 insulate himself.

2 So the key inquiry here is whether they
3 were voluntary and intelligent statements, or whether
4 they were coerced statements by some mental
5 incapacity. Mr. Perez' own testimony, as well as
6 cross-examination of Mr. Cordova, by his own counsel,
7 get rid of any possibility that Mr. Perez did not
8 give voluntary and intelligent statements. Indeed,
9 both of them brought out that he used Mr. Cordova in
10 a very intelligent manner.

11 And so regardless -- I mean, the inquiry is
12 clear: There has to be some mental incapacity. That
13 mental incapacity then has to be known by the
14 Government. And then, third, the Government has to
15 take advantage of that known mental incapacity.

16 So the Court doesn't even have to reach the
17 decision here whether Mr. Cordova actually provided
18 Suboxone, because Mr. Perez' testimony was clear that
19 he provided a voluntary and intelligent statement.
20 Indeed, Mr. Perez said that he could recall specific
21 details about who was involved in the Molina homicide
22 from months before, when they were in a different
23 facility in the X pod.

24 Now, Ms. Fox-Young got up here and talked
25 about how we can't believe --

1 THE COURT: I'm not sure I quite understood
2 that last statement. If you want to elaborate or say
3 it again.

4 MR. BECK: Yes. When Mr. Castellano was
5 cross-examining Mr. Perez, he asked Mr. Perez: You
6 have all these specific details that identify exactly
7 who was involved in the Molina homicide, who had the
8 shanks, who made the shanks, who stabbed Molina, who
9 took the shank after the murder, who didn't take the
10 shank after the murder, although he should have. How
11 do you remember those? And Mr. Perez said, Well, Mr.
12 Cordova told me, and that's how I knew those. And
13 Mr. Castellano dialed him down and said, Well, when
14 did he tell you this? He said, Well, we were all
15 together in X pod months before Billy Cordova came
16 in, and Eric Duran came in, and they had these
17 recorders; months before that we were in X pod.

18 And so now you've got someone who is
19 asserting in the motion that he was under the
20 influence of narcotics, or he didn't have a high
21 enough IQ, or somehow his physical disabilities
22 prevented him from making voluntary and intelligent
23 statements, when he did so, but yet, he can recall
24 specifically the exact things that -- not that he
25 knew, but that he was told only months before that,

1 or months before that. I mean, that just is not
2 credible, to know every one of those details, having
3 only been told that, as opposed to actually
4 experiencing it and actually being there.

5 So any claim that his statements were
6 involuntary and unintelligent are just vitiated by
7 his testimony and by what Mr. Villa brought out on
8 cross-examination.

9 To the extent -- I think there was
10 something about, if you look at the Fulminante case,
11 in that case, the defendant's statement was
12 involuntary because he was given a promise of
13 protection. There was never any testimony brought
14 out from Mr. Cordova. Mr. Cordova never testified on
15 direct examination that he ever promised Rudy Perez
16 anything in exchange for these. What he said was
17 that he used pressure points, which Ms. Jacks brought
18 out on cross-examination. He said -- and you'll find
19 this in the transcript when they're produced -- he
20 said in response to Ms. Jacks' cross-examination what
21 he meant by pressure points was that they can't come
22 out directly and say, Hey, did you do this? And so
23 what he was doing was -- I'm quoting -- "trying to
24 get him to reveal the truth." So pressure points
25 meant he was talking in coded language to try to get

1 the truth out, because in the prison walls, if you're
2 surreptitiously recording someone, you can't say,
3 Hey, did you provide the shanks for the Molina
4 homicide? So with all that evidence, it's destroyed.

5 Now, if we get to the contentions about
6 being kept in involuntary segregation, and this
7 elaborate plan and this ruse to keep all of the SNM
8 members throughout the entire prison system in Level
9 6 secured lockdown, just so that we could go and --
10 just so that the FBI could go and get statements from
11 two people in the SNM, Perez and Herrera, if we think
12 about how illogical that is, when they said they had
13 hundreds of SNM members that were locked down, that
14 contention doesn't hold water.

15 But beyond just that being not logical, the
16 testimony didn't support it. You heard from Mr.
17 Roark the reasons -- and he was in control of this,
18 he was head of the adult prison system. You heard
19 from him the reasons they were on lockdown. The
20 Molina homicide was that, if you look back at the
21 policy, it says, a violent incident was one of the
22 requirements. That's the Molina homicide. So he
23 attributed that to the entire STG, Security Threat
24 Group, all SNM members, all SNM-suspected members.

25 Now, that might be too broad, but that's

1 not the inquiry here. That may be -- as I said in
2 opening arguments for this, that may be a reason for
3 a 1983 claim from Mr. Perez, Mr. Herrera, or other
4 SNM members, but it's not a basis to find the
5 statements involuntary or coerced by law enforcement
6 in some manner.

7 So, to find that there was coercion --
8 excuse me, let me go back -- so the Molina homicide,
9 and then as soon as they were being let down and
10 preparing to let them back into Level 4, in the
11 summer of 2015, in July 2015, Mr. Roark told you
12 there was the Julian Romero assault, and they were
13 again -- that was a violent incident, now they're
14 back into Level 6 under the policy. So the fact
15 testimony from Mr. Roark, you heard it from the
16 horse's mouth about why those decisions were made,
17 and they do fit within the policy. There is a
18 violent incident.

19 To find that this was a ruse, and that the
20 FBI somehow placed Mr. Herrera and Mr. Perez in the
21 cells solely to put Mr. Cordova next to him, you have
22 to find at least two people's testimony up there on
23 the stand incredible. You have to find that Special
24 Agent Acee lied when he said he had no information
25 about why they were placed there; he didn't direct

1 anyone to do that; he didn't ask for anyone to do
2 that. And you have to find him lying when he said he
3 didn't hear that from any of the STIU officers or
4 from Mr. Myers. You also have to find that Mr. Roark
5 lied when he said he didn't have any information from
6 the FBI asking him to move Mr. Herrera and Mr. Perez.
7 You have to find that Mr. Roark lied when he told you
8 that they placed them in Level 6 because of the
9 Molina homicide and then because of the Julian Romero
10 assault. So that's two-fold.

11 I think that gets rid of Mr. Herrera's
12 claim about being put there. Also, I think the
13 argument was: Read the transcripts, there is a lot
14 of unintelligibles. If the Court looks closely at
15 the transcripts here, what the Court will find is
16 Carlos Herrera's Exhibit C. And this was the
17 transcript in which you heard Mr. Cordova testify
18 that, when Mr. Chavez says, "Over there doing bad,
19 huh," in reference to "Lazy," Carlos Herrera, "doing
20 bad" as in not high, as in sober. So you have that
21 testimony. He was sober, was going to bed. Then you
22 have Carlos Herrera's Exhibit A. Now, bearing the
23 day -- this is one where I think was brought out how
24 many UIs there are, how many unintelligibles. But
25 you heard unintelligible doesn't mean anything other

1 than whoever is listening to that can't make out the
2 word. In this first page we came up with, I think,
3 one stutter.

4 Now, instead of reading the transcripts, I
5 would invite the Court to listen to the recordings.
6 We heard from Mr. Perez. We got his testimony up
7 there. Some of the words, some of what he was saying
8 was difficult to understand. You heard from Special
9 Agent Acee that it's difficult to understand what
10 these guys are saying -- excuse me, what these SNM
11 members are saying in the prison. And in the
12 recording it's difficult to say. That doesn't mean
13 he's under the influence, as opposed to it's
14 difficult to understand.

15 Now, we didn't benefit from getting to hear
16 Mr. Herrera up there on the stand, and listen to
17 whether we could understand him perfectly clearly.
18 All that we have from Mr. Herrera is an affidavit, an
19 affidavit in which he didn't take the stand,
20 submitted only this affidavit. If we look at this,
21 Mr. Herrera says, during the time he was in there,
22 "Billy Cordova was an inmate at PNM South, and was in
23 a cell next to me." He goes on to say, "Prior to
24 each of these conversations, Cordova would place
25 strips of Suboxone under the door of my cell." So

1 again, we have in paragraph 2, the cell next to Mr.
2 Herrera. In paragraph 6, Suboxone strips under the
3 door. Except that when we heard about Mr. Cordova's
4 knowledge of drugs in the prisons -- and I grant it
5 was extensive -- he said that if someone was in the
6 cell next door, he passed Suboxone strips through the
7 vents. After he said that, you heard Mr. Perez get
8 up on the stand and he testified under oath that
9 Billy Cordova placed Suboxone in his cell through the
10 vents, exactly as he heard Mr. Cordova say earlier.

11 This, in paragraph 6 of Mr. Herrera's
12 affidavit, is contrary to that. Billy Cordova said
13 if there was someone in the cell next to him, he
14 would not give him Suboxone strips under the door.
15 He would only do that if someone was down -- I think
16 he said the freeway or the interstate, or whatever
17 that was. If there were multiple cells in-between,
18 they would fish them under the door. If they were
19 next to each other, they went through the vents. So
20 not only do we have only an affidavit, we have an
21 affidavit that is inconsistent with two people's
22 testimony.

23 Again, I think if we look at -- I know Ms.
24 Fox-Young listed all of what I think the case law
25 refers to as the circumstances of voluntary and

1 intelligent statement. Oftentimes, what we're
2 looking at is that statement in isolation, and we
3 don't benefit from the testimony that we've heard
4 over these two days. We don't benefit from hearing
5 from the defendant himself. We don't benefit from
6 the defendant's testimony that he used,
7 intelligently, Mr. Cordova to spread rumors about
8 himself. We don't hear from the person who recorded
9 the conversation oftentimes.

10 So I would say, if the Court looks at the
11 transcripts, the Court looks at the evidence over
12 these last two days, the Court should find voluntary
13 and intelligent statements.

14 So, finally, I think there was sort of a
15 policy argument made at the end that, if we go down
16 this road, you know, we're inviting future violations
17 of this.

18 I would say the other side of that policy
19 argument is just as strong. If this Court finds
20 that, because these folks were in prison, their
21 statements were, as a matter of law, not voluntary
22 and intelligent, there can be no more recordings made
23 of voluntary and intelligent confessions within the
24 jail system. And in a system in which we have
25 violent prison gangs, we have murders, assaults on a

1 daily basis, that can't be a good policy to just say,
2 as a matter of law, we cannot send recorders in there
3 to record voluntary and intelligent statements by
4 other prison inmates.

5 I'll stand for questions, or else I'm done.

6 THE COURT: I don't believe I have any
7 questions. Thank you, Mr. Beck.

8 Let me ask other defendants, before I hear
9 from Ms. Fox-Young and Ms. Bhalla, if they have any
10 final comments? Anybody else have anything they want
11 to say on these two motions?

12 All right. Ms. Fox-Young. You may
13 certainly say whatever you want to on your motion, or
14 the motions. What do you -- how do you respond to
15 Mr. Beck's pointing out that in Mr. Perez' testimony
16 he did seem to have a lot of details about the
17 murders? I think everybody would agree with that.
18 Your story being that he had heard all that. The
19 Government saying that is really not credible that he
20 knew all those details just from hearing other
21 people? Your thoughts on that?

22 MS. FOX-YOUNG: Yes, Your Honor. I'll
23 respond in a couple of ways. First of all, more than
24 a year-and-a-half after the statements were given,
25 Mr. Perez has had the benefit of months and months to

1 look at these statements, and to learn about this
2 case. We all have in hearing after hearing. In
3 February 2016, you know, things were different. So
4 his testimony is retrospective. That's, I think, the
5 first point.

6 Secondly, Judge, we're not arguing that Mr.
7 Perez had no awareness of reality; that he couldn't
8 hold a conversation; that he was so drugged and so
9 infirm that he couldn't converse. And that's not the
10 test. I think the Court has to go back to the law,
11 and sort of a distraction to say, well, you know, Mr.
12 Perez admitted that he was lying, or some statements
13 were true, or some statements are corroborated in the
14 discovery. None of that makes any difference. The
15 Court has to look back at Fulminante and its progeny,
16 and make the inquiry as to whether or not there was
17 coercion under those cases. And it's a totality of
18 the circumstances test. It's a combination of all of
19 the factors that we have identified and that the
20 Court has heard.

21 And so I think it's a bit of a distraction
22 to go into -- remember Mr. Castellano asked Mr.
23 Perez: Don't you think it's interesting that some of
24 this is corroborated, you know, and this is evidence
25 that has come out in the case? It's completely

1 irrelevant. If the Court looks at Fulminante, there
2 was no allegation there or no assertion there that
3 Mr. Fulminante couldn't carry on a conversation, that
4 he couldn't make conscious decisions. That's just
5 simply not the test.

6 And so, yes, Your Honor, I mean, I think
7 Mr. Perez was pretty clear when he went through
8 statement by statement with the Government what he
9 knows now about what may or may not be true, what may
10 or may not have really happened. And he explained to
11 the Court, I think, very clearly and credibly that at
12 the time there was a bunch of stuff that had been put
13 in his mind by Billy Cordova. And that's what he was
14 fixating on. That's what he seized on in order to
15 protect himself. And that's where he had learned
16 some of those facts. He didn't know whether they
17 were true or not.

18 Again, I don't think it really goes to the
19 Court's inquiry. I don't know if I've adequately
20 answered the Court's question, or if I should move on
21 to other points.

22 THE COURT: Go ahead.

23 MS. FOX-YOUNG: Okay. Additionally, you
24 know, the Government responds on Billy Cordova's
25 pressure points saying Billy Cordova was just using

1 coded language. He explained to the Court that
2 that's what he meant by pressure points. What he
3 explained to the Court was, essentially, he was
4 capitalizing on Rudy Perez' fear. Mr. Cordova is a
5 smart, manipulative, seasoned guy. And he said, They
6 were going to move on him. I used that information.
7 I knew that Rudy knew it, I knew it, everybody knew
8 it, that he was thought to be cooperating. That was
9 a pressure point that I used in order to extract
10 information to get him to talk to me, to get what I
11 needed to get benefits from the Government.

12 And I -- I think his language was the most
13 instructive that the Court has heard, when he talked
14 about those pressure points, what he used as a
15 Government agent to get Rudy to talk.

16 Moving to the fact that Mr. Perez was held
17 in Level 6, without justification, according to
18 policy or even reason, I'd like to show the Court one
19 exhibit that came into evidence last week, and note
20 that, you know, the Government could have put on
21 testimony. It's their burden. They could have put
22 on testimony or evidence to explain why Mr. Perez was
23 held. But it doesn't exist. There is no rational,
24 reasonable explanation pursuant to policy for why Mr.
25 Perez was there.

1 What I want to show the Court -- I'm not
2 sure where this exhibit is, but it's the email that
3 Mr. Roark testified about, that was forwarded by
4 Wendy Perez, a year after Mr. Roark sent it. Mr.
5 Roark's emails was to all the wardens, and it said,
6 we've got to do these routine audits in order to make
7 sure that people are doing their proper disciplinary
8 time. Ms. Perez, who the Government could have put
9 on today to rebut these allegations and to meet their
10 burden, then sends that email along to the Warden,
11 and says, "Call me about this." Subject line: Rudy
12 Perez.

13 I think it clearly shows a year later, more
14 than a year after Mr. Roark testified that they
15 closed the books on the Molina investigation, and
16 things had returned back to normal with the SNM, they
17 are looking for reasons to hold Rudy Perez in Level
18 6. And, you know, to the Government's argument that
19 Mr. Cordova just appears, he just sprouts in Level 6
20 one day, he just shows up there. Special Agent Acee
21 had nothing to do with it. The New Mexico
22 Corrections Department had nothing to do with it.
23 You know, sort of borders on the absurd. Of course,
24 they had something to do with it. Of course, he
25 shows up there just days after Special Agent Acee

1 opens him as an informant. And he's there for a
2 specific reason. Mr. Perez and Mr. Herrera are there
3 for specific reasons.

4 The entire SNM was not held there at that
5 time, and the Court heard it had been many months
6 since those guys were shipped to Level 6. They were
7 targeting these two potential defendants. They
8 wanted to extract statements from them, and that's
9 why they came up, Judge, with a reason to hold them.
10 And let me just briefly draw the Court's attention to
11 RP-H, which Mr. Roark testified that he did send this
12 email, February 11, 2015, to all the wardens about
13 these routine audits that were to be done.

14 Wendy Perez -- the Court can see, Wendy
15 Perez finds that email a year later, changes the
16 subject line, and forwards it to Roland Mares, who I
17 believe is the Warden, and then to German Franco, who
18 actually I think is the Warden, and says, "Call me on
19 this, so I can explain, please."

20 What subsequently happens is that the
21 Corrections Department finds a ruse, a reason to hold
22 Rudy Perez in Level 6. And Mr. Roark testified there
23 was no credible threat according to their policy that
24 existed in February 2016. There was no paperwork
25 documenting a reason, a proper reason, to hold Mr.

1 Perez there. Nothing at all. And it's the
2 Government's burden. They have not put on any
3 testimony to explain why Mr. Perez was there, except
4 Billy Cordova and Special Agent Acee and Mr. Roark
5 saying, Yeah, he was there at the same time. It was
6 right after Mr. Cordova was opened as an informant.
7 Mr. Cordova just ends up next to him.

8 I mean, it just defies reason that this
9 just magically happened. It absolutely was known and
10 engineered. The Court doesn't have to disbelieve
11 Special Agent Acee. I think it's reasonable to
12 conclude that Special Agent Acee was forthright with
13 the Court in saying he didn't know exactly where Mr.
14 Cordova would be placed and when. But it was the
15 Corrections Department, working with the FBI, working
16 with this Government agent, CI, to extract statements
17 from Mr. Perez that matter. So the Court doesn't
18 have to disbelieve Special Agent Acee. And the Court
19 certainly doesn't have to disbelieve Mr. Roark when
20 he says, Yes, Mr. Perez was held in Level 6. It was
21 essentially contrary to policy. You know, I can't
22 give you an explanation as to why he was there. You
23 know, Mr. Cordova just showed up next to him. I
24 can't explain this. The Government has not given the
25 Court any other reason except for this sort of

1 amorphous testimony, yes, there was no credible
2 threat. You know, he was SNM, so we believe we can
3 hold him there. I mean, I think the Court can
4 believe all that and take it all into consideration.
5 And it clearly fits well within our arguments that
6 Mr. Perez was held there improperly, and specifically
7 for the purpose of extracting statements.

8 Again, Your Honor, it's just the
9 Government's burden to prove that these statements
10 weren't coercive. And I don't think that they've
11 given the Court anything to go on as far as a theory
12 that this just appeared magically.

13 With regard to the Suboxone, I think Mr.
14 Cordova's testimony was very clear as to how Suboxone
15 could be fished from one cell to the next. I think
16 there are multiple ways that can be done. The Court
17 heard from Mr. Perez as to how he received it and
18 took it.

19 And I think, clearly, the Government falls
20 short of meeting the standard to show that these
21 statements were constitutionally taken. When you
22 look at the relevant circumstances, the
23 characteristics of Mr. Perez, the details of how
24 these statements were extracted, where he was placed,
25 and what he was up against, there is no question but

1 that the Court should suppress them.

2 THE COURT: All right. Thank you, Ms.
3 Fox-Young.

4 Ms. Bhalla, I'll give you the last word on
5 these two motions.

6 MS. BHALLA: Thank you, Your Honor. I just
7 want to address a couple of points.

8 Mr. Perez, at the time that Mr. Cordova was
9 placed next to Mr. Perez, was in a different facility
10 than when he was placed next to Mr. Herrera. And
11 while their conditions of confinement were similar,
12 their housing situation was different. And I think
13 that explains the different methods for getting drugs
14 into the cell. It's going to be different depending
15 on where they are. But what is consistent is that
16 Mr. Cordova was providing drugs.

17 I don't think that the Court has to find
18 that Special Agent Acee lied about his knowledge
19 about placement. He could walk away from that
20 decision. This was a joint investigation. NMDOC was
21 working with the feds. All that Special Agent Acee
22 had to do was tell them, "I want Cordova next to
23 these guys. You guys make it happen." And whatever
24 methods they employ to do that are attributable to
25 the Government, whether or not Special Agent Acee

1 approved it.

2 In terms of the transcripts, the -- I'm
3 sorry, I don't have the exhibit number in front of
4 me, Your Honor -- but the exhibit that we talked
5 about where Mr. Cordova was discussing prices for the
6 drugs that he could get, the Government alleges that
7 these were the prices for street drugs. Mr. Cordova
8 testified he'd been in custody for 13 months at that
9 point, and he was able to get a better price than
10 Mr. Chavez. And that was the discussion. And
11 Mr. Chavez specifically says: You can still get them
12 for five, right? Yeah.

13 Now, when they say Mr. Herrera was going
14 through withdrawals and not high, it's interesting
15 that's their argument now. Because in their briefing
16 their argument was that it was bedtime, and they were
17 all sleepy. And I think that's an interesting thing
18 that the argument is changing depending upon what Mr.
19 Cordova has been telling them. And I would ask the
20 Court to look at the briefing and compare it to the
21 argument today that he was withdrawing rather than he
22 was sleepy.

23 So that's all I have to finish up, Your
24 Honor. Unless the Court has any questions.

25 THE COURT: I don't believe so. Thank you,

1 Ms. Bhalla.

2 MS. BHALLA: Thank you, Your Honor.

3 THE COURT: Well, let me say with this
4 motion, since a lot of effort has been put into it, I
5 would be glad to take it under review and advisement.
6 Y'all have pointed out today a number of things that
7 you would like me to review, and issue an opinion
8 with detailed findings of fact and conclusions of
9 law, if that's what you'd like for me to do. As
10 we've been going through the hearings -- and I'll
11 probably do it every day, and at the conclusion of
12 each hearing, or set of hearings, try to determine
13 what you'd like for me to work on, and take a special
14 look, and this may be one of them.

15 But I am going to give a ruling this
16 morning that will be the ruling for trial, unless --
17 and these will constitute my findings of fact, unless
18 this is one of the sets of motions that the parties
19 would like for me to spend more time on between now
20 and trial.

21 Let me first talk -- there has been an
22 invitation by both sides that I be careful about how
23 my rulings might impact upon other prison
24 investigations. I think I got my hands full here in
25 determining what I should do with this evidence.

1 Certainly, I'm always aware of the impact that my
2 rulings may have on future investigations or other
3 cases. But I'm also mindful I'm a district judge,
4 and my rulings have only impact on the trial I'm
5 about to have. And so I will probably not get too
6 wrapped up in trying to figure out what the impact
7 will be on future prison investigations.

8 Let me start by indicating on this the
9 prison placement. I do think that to go the
10 direction that the defendants want me to go in this
11 case does require me to probably find that Mr. Acee
12 and Mr. Roark were not credible in certain of their
13 testimony. I know Ms. Fox-Young has offered ways of
14 getting there that do not put their testimony in
15 doubt. But I do think that, in the end, it would.

16 And I find Mr. Acee credible that he did
17 not have any role in placing Mr. Herrera and Mr.
18 Perez, and that the Corrections Department did that.
19 Mr. Roark seems to corroborate that, in the sense
20 that why they were where they were was because of the
21 Molina homicide, and that was the reason for the
22 lockdown. So I don't find the placement issue really
23 helps the defendants much on the coercion and the
24 voluntariness issue, which is what this motion is
25 about -- these two motions are about. I don't see

1 information on the placement side that really
2 undercuts what Mr. Acee and Mr. Roark, rather
3 straightforwardly testified about, about how they got
4 where they are. Certainly, Mr. Acee was involved in
5 putting Mr. Cordova next to the cells of Mr. Herrera
6 and Mr. Perez. But I don't think he had any
7 involvement in where those two defendants were
8 placed. And I think Mr. Roark's testimony supports
9 that.

10 I guess y'all may have -- I may be the only
11 one in the room that really didn't know what Mr.
12 Cordova was going to look like. Somebody else
13 probably had some knowledge. And I am probably the
14 most ignorant there, so I was curious as to what he
15 would look like, how he would testify, and what that
16 testimony would present. I did think that Mr.
17 Cordova was a very good witness, and found him to be
18 credible in all material respects. I don't think he
19 promised Mr. Perez, Mr. Herrera anything. I think by
20 pressure points, I do agree with Mr. Beck's
21 assessment that you don't just walk in to one of
22 these facilities and start asking people: What was
23 your role in the killing of Molina. You have to talk
24 in coded language. And Mr. Cordova was trying to
25 figure out how he could get the testimony from Mr.

1 Herrera and Mr. Perez that he needed to do his job.
2 I don't think that I find him credible in that he did
3 not provide Suboxone. And so I find that -- I will
4 credit in my findings of fact in all material
5 respects his testimony where it differs from Mr.
6 Herrera and Mr. Perez.

7 In contrast to Mr. Cordova, I found that
8 much of Mr. Perez' testimony was incoherent and hard
9 to follow, and difficult to come up with a structured
10 response to what Mr. Cordova's rather straightforward
11 story was. Either he's lying here on the stand, or
12 he was lying then. There may have been times he lied
13 both. But in the end, I can't put together a
14 credible enough and coherent enough story to find his
15 testimony credible here in the courtroom.

16 I think Mr. Perez is intelligent. I think
17 was intelligent at the time. I've reviewed enough of
18 these transcripts to find him intelligent at the
19 time. His testimony that he knew he could use Mr.
20 Cordova to spread the rumor or tale or story that he
21 was not a rat, I think, undercuts his argument now
22 that his statements then were involuntary. I don't
23 find any considerable mental defect or incapacity.
24 He may have some health problems, may use some drugs.
25 But it doesn't seem that there is any evidence that

1 the Government knew those things, or more
2 importantly, knew those things and tried to take
3 advantage of it. His statements appear, both at the
4 time that he gave them and his testimony here in the
5 courtroom, are that his statements were voluntary and
6 intelligent. He knew details of the murder. And I
7 certainly don't find these beyond a reasonable doubt,
8 that's a function for the jury. This is just for
9 purposes of the suppression motion. But I don't find
10 credible that he only knew those things because they
11 were told him. I will find that more likely than
12 not, he knew those details because he was involved in
13 the murder of Mr. Molina. I don't think that there
14 is sufficient evidence that he was under drugs or was
15 incapable of making the statements voluntarily and
16 intelligently.

17 I find the same with Mr. Herrera because of
18 the persuasive testimony of Mr. Cordova.

19 So I will deny the motion to suppress
20 involuntary statements 1294 and motion to suppress
21 statement 1295.

22 I understand that the next thing we were
23 going to go to was a resumption of the Daubert
24 hearing as to the gun. I believe this is Mr. Chavez'
25 motion on the gun -- Chavez' testimony. I'm not sure

1 I can read my notes here, but is that where we're
2 going next, is the Daubert hearing?

3 MR. ADAMS: Yes, sir, I believe so.

4 Mr. Garcia had filed a Daubert challenge to the gun
5 that was seized from his home, and Mr. Chavez was
6 noticed as the expert.

7 THE COURT: Okay. And y'all will have to
8 refresh me where we were on that. I know we got --

9 MR. ADAMS: We have not started that, Your
10 Honor.

11 THE COURT: We've not started that. All
12 right. So is the Government going to take the lead
13 on this motion?

14 MR. CASTELLANO: Yes, Your Honor. We're
15 calling Theodore Chavez. Just to clarify, this is
16 not a firearm seized from Mr. Garcia's home. It was
17 turned over as part of an undercover operation.

18 MR. ADAMS: I accept that friendly
19 amendment. That's correct.

20 THE COURT: All right. Mr. Castellano, you
21 have witnesses or evidence you wish to present on
22 this motion?

23 MR. CASTELLANO: Yes, Your Honor. The
24 United States calls Theodore Chavez.

25 THE COURT: Mr. Chavez, if you'll come up

1 and stand next to the witness box on my right, your
2 left. Before you're seated, Ms. Standridge, my
3 courtroom deputy, will swear you in.

4 THEODORE CHAVEZ,
5 after having been first duly sworn under oath,
6 was questioned and testified as follows:

7 DIRECT EXAMINATION

8 THE CLERK: Please be seated, and the state
9 your name for the record.

10 THE WITNESS: First name is Theodore, and
11 the last name is Chavez.

12 THE COURT: Mr. Chavez. Mr. Castellano.

13 MR. CASTELLANO: Thank you, Your Honor.

14 BY MR. CASTELLANO:

15 Q. Good morning, Mr. Chavez.

16 A. Good morning.

17 Q. Where are you currently employed?

18 A. I'm currently employed by the Federal
19 Bureau of Investigation Laboratory, located in
20 Quantico, Virginia.

21 Q. What are your duties at the laboratory?

22 A. My primary duties as physical scientist
23 forensic examiner, is to receive evidence relating to
24 firearms and tool marks, conduct examination on those
25 requested items, provide examination results, and

1 issue a laboratory report, and then provide testimony
2 to those results in a court of law.

3 Q. Can you tell us a little bit about your
4 educational background?

5 A. I received a bachelor's in physics from St.
6 Vincent College, located in Latrobe, Pennsylvania.

7 Q. And what other types of training and
8 experience do you have?

9 A. Upon entering employment there at the FBI
10 Lab, I entered what approximately would be a
11 three-year training program, in order to become
12 qualified within the firearms and tool marks unit.
13 That just allowed for me to receive a training manual
14 that outlined the training progress throughout those
15 years, whether it be sign-offs by a qualified
16 examiner, or also sort of a mentorship, conducting
17 casework alongside those other qualified managers.

18 Q. What is firearms identification?

19 A. Firearms identification can be defined as
20 the comparison between bullets, cartridge cases,
21 other ammunition components, to determine if they
22 were produced by a specific firearm.

23 Q. And what makes firearms identification
24 possible?

25 A. Firearms identification is possible due to

1 the manufacturing of these items, whether it's a
2 barrel of a firearm, or a slide from a firearm. It's
3 these manufacturing processes that leave individual
4 characteristics or microscopic marks that are used
5 for identification.

6 Q. You told us a little bit about your
7 training earlier. Who conducted that training?

8 A. When I received the training manual, there
9 is a training program manager for the unit. And I
10 was assigned to a training coordinator. The training
11 coordinator who overlooked my training was Eric
12 Smith.

13 Q. And as part of your duties, have you been
14 involved with the training and/or instructing of
15 others?

16 A. Since qualification, yes.

17 Q. What types of training have you provided?

18 A. So the FBI has an Evidence Response Team,
19 or ERTs, throughout different field offices. And in
20 order to become a member of the ERT, they will go to
21 what's described as a basic class. And it's hosted
22 there in Virginia at the Operational Response Center.
23 And part of their one-week, if not two-week training,
24 they learn the different types of examinations that
25 my unit performs, as well as understanding the type

1 of evidence handling that is necessary to preserve
2 those items that are submitted to the lab.

3 Q. Are you a member of any professional
4 associations?

5 A. I am.

6 Q. Can you tell us about that?

7 A. I am a regular member of AFTE, the
8 Association of Firearms and Tool Mark Examiners. And
9 that is just a professional organization; it has
10 various firearms and tool mark examiners within the
11 U.S., as well as international.

12 Q. Any other professional associations?

13 A. No.

14 Q. Were you required to pass any standardized
15 tests to become qualified for your post?

16 A. Yes. So upon qualification, I would have
17 had to have completed a total of three oral boards
18 and three moot courts. Those were all handled by
19 qualified examiners within the unit, as well as
20 outside evaluators. Upon completing those tasks or
21 those outlines within the training manual, I was then
22 qualified as a firearms and tool mark examiner, able
23 to complete casework independently.

24 Q. And was it those people who determined that
25 you were qualified to reach your conclusions?

1 A. That is correct.

2 Q. Is your work peer-reviewed?

3 A. Yes. There are two types of reviews: A
4 technical, as well as an administrative review.

5 Q. And how does the peer review work?

6 A. A technical review will be conducted on any
7 supporting documentation, to include a laboratory
8 report that is issued, or prior to issuance. The
9 technical review is handled by another qualified
10 examiner within the same category of testing. So
11 they will review all supporting documentation to
12 ensure that it supports outlined results.

13 And the second type of review is
14 administrative review. That is handled by typically
15 a supervisor in my case, my unit chief. And so she
16 just ensures that the contributor is receiving a
17 sound laboratory report, as well as all
18 administrative tasks are completed to have that
19 report issued.

20 Q. And is this regularly done as part of your
21 responsibilities and the conclusions that you reach?

22 A. That is correct.

23 Q. Do you work in the accredited laboratory?

24 A. Yes, I do. The FBI lab is accredited by
25 ASCLD Lab, or the American Society of Crime

1 Laboratory Directors, Laboratory Accreditation Board.

2 Q. How did they accredit your laboratory?

3 A. Typically, a reaccreditation occurs every
4 five years. So throughout the five-year window,
5 there are surveillance visits that occur. I handle
6 the quality assurance program for my unit, so I have
7 working knowledge of all the internal audits that are
8 conducted yearly, as well as a review of the
9 documents, and actual participation in those
10 surveillance visits by outside assessors.

11 Q. Do you have established protocols for
12 conducting examinations?

13 A. Yes, we do.

14 Q. Who established those protocols?

15 A. A protocol, if it's an existing protocol,
16 will go through an annual review. The annual review
17 is done just to ensure that the business practices
18 that are being handled within the unit are
19 functioning under this SOP. It will go through a
20 technical review if it's a new document. And the
21 document would then be reviewed by our technical
22 leader. And upon review by the unit, it then will be
23 reviewed by FASU, the Forensic Analysis Support Unit.
24 And they will just ensure that it's in line with the
25 accreditation requirements that are observed by the

1 laboratory.

2 Q. As part of your responsibilities did you
3 receive a Phoenix Arms pistol, serial number 4208834,
4 at the laboratory?

5 A. That's correct.

6 Q. For what purpose did you receive this
7 firearm?

8 A. In this case, the firearm was submitted for
9 a function test. Because it is also a pistol, I
10 searched a national database search. So the report
11 that I issued would have contained a function test,
12 as well as national database searches.

13 Q. Let's start with the database searches
14 first. What is the purpose of those searches?

15 A. So there are three different types of
16 database searches, all handled by the DOJ: There is
17 NCIC, the National Crime Information Center; eTrace,
18 which is the electronic tracing system; and NIBIN,
19 which is the National Integrated Ballistic
20 Information Network. NCIC is a stolen gun record
21 database that can be searched by anyone who has an
22 NCIC account; eTrace is information that is also
23 collected either by a purchaser, or upon distribution
24 by a manufacturer, basically just gives a historical
25 timeline of that firearm; NIBIN is a database that

1 allows for cartridge cases to be searched against
2 each other. So it's acquisition, as well as a
3 correlation.

4 Q. So, in this case, can you tell us about the
5 results of each of those database searches?

6 A. So the NCIC have no records, which
7 indicated it was not stolen. The eTrace did have an
8 existing trace number. So that trace number or the
9 trace may have actually been conducted by the field
10 office. And that's -- one of the policies we have
11 currently in place, as part of the field evidence
12 policy, is that anyone in the field offices who prior
13 to sending it to the lab will have conducted that
14 trace. And the NIBIN result was also no associations
15 at the time.

16 Q. After the NIBIN search, is that something
17 that tells you -- for example, you have a crime scene
18 with unknown cartridges; are those put in the system
19 for a possible match for future crimes, so you can
20 match them up?

21 A. That's correct. The NIBIN will contain
22 cartridge cases that have no associated known
23 firearm.

24 Q. Okay. Now, tell us about the function
25 test, please.

1 A. So I would receive the firearm in the unit
2 and be conducting sort of a general population of
3 make, model, caliber, different features of that
4 firearm, to include the serial number, the overall
5 length of the firearm, as well as preparing it for
6 function testing. So at the laboratory we have a
7 water tank not much longer than the witness stand
8 here, that is filled with water. And what we'll
9 actually do is take the firearm, and we'll test fire
10 it into a water tank. In this case I tested it
11 twice. So I first loaded a round into the chamber,
12 as well as it was noted that no magazine was
13 submitted with this firearm. So I used the reference
14 firearms collection, which the FTU also maintains,
15 Firearms and Tool Marks Unit maintains, and that
16 contains over 7,000 different types of firearms. So
17 I was able to use a magazine that had the same
18 functionality allowed for it to work with the pistol;
19 test fired into the tank two times, and collected
20 those known bullets, as well as known cartridge
21 cases. The cartridge cases would then be entered
22 into NIBIN, and the bullets be used for additional
23 information collecting the GRCs, or the general
24 rifling characteristics of that barrel.

25 Q. Each time you fired the weapon -- you

1 mentioned first by putting a round in the chamber,
2 and then using a magazine to feed ammunition through
3 the firearm. On each occasion, did the firearm
4 function as designed?

5 A. Yes, it did.

6 Q. Do you recall what caliber this firearm
7 used?

8 A. This was a .22 long rifle caliber.

9 Q. For those who don't understand firearms or
10 ammunition, the fact that it's called a .22 long
11 rifle, does that mean it's only used for rifles or
12 can it also be used for pistols?

13 A. There are manufacturers that have both
14 pistols and rifles calibered for a .22 long rifle.

15 Q. In other words, can you fire a .22 long
16 rifle ammunition through this pistol?

17 A. That's correct.

18 MR. CASTELLANO: May I have a moment, Your
19 Honor?

20 THE COURT: You may.

21 MR. CASTELLANO: Thank you, Your Honor. I
22 pass the witness.

23 THE COURT: Thank you, Mr. Castellano.

24 Any defendant before Mr. Adams have any
25 cross-examination of Mr. Chavez?

1 All right. Mr. Adams.

2 Let me put on the record. Ms. Fox-Young
3 asked that we indicate that Rochelle Marin from Mr.
4 Villa's office is also on the phone. Is there anyone
5 else that's come on the phone since we started the
6 hearing that hasn't entered an appearance? Make sure
7 your mute button is not on if you're about to speak.

8 All right. Mr. Adams.

9 MR. JEWKES: May I approach?

10 THE COURT: You may.

11 MR. JEWKES: Our client, Daniel Sanchez,
12 was taken out of the courtroom by the Marshal
13 Service. He's very ill. And there is a question as
14 to whether or not they should return him to the
15 courtroom. Mr. -- the marshal whose name escapes me,
16 he goes by the name of Mick.

17 THE COURT: It's Mick.

18 MR. JEWKES: He was just telling me the
19 situation. So we wanted to put on the record that
20 Mr. Sanchez is not in the courtroom due to illness.

21 THE COURT: What kind of illness does he
22 have, Mick?

23 MR. MICKENDROW: He is throwing up, Your
24 Honor. My concern is just having him stay here all
25 day and being uncomfortable. Unfortunately, the

1 Marshal Service is unable to provide any medication
2 whatsoever, due to our policies. And at least, if
3 he's returned to the facility, they might be able to
4 provide him something in which he'd be a bit more
5 comfortable.

6 THE COURT: Well, let's do this: Let's
7 take our morning break. Let's see if we can give him
8 some fluids or something like that, and get him
9 sitting back in here. I'd rather the marshals not
10 make that decision. I'd rather -- hold on, hold on.
11 Everybody be quiet. I'd rather the marshal not make
12 that decision whether he's in or out. If he can't do
13 it, or something like that, that's a different
14 question. But maybe we could reposition him or
15 something like that, if it's something we're
16 concerned about being contagious or something. But
17 let's see if we can get some fluids in him, let him
18 use the restroom a little bit and then maybe we can
19 resume.

20 MR. MICKENDROW: Understood, Your Honor.

21 THE COURT: All right. We'll be in recess
22 about 15 minutes.

23 (The Court stood in recess.)

24 THE COURT: All right. We'll go back on
25 the record. I think everybody has got a lawyer, at

1 least one. Look around, make sure your co-defendant
2 has a lawyer.

3 All right. Mr. Sanchez, are you doing
4 okay?

5 THE DEFENDANT: I'm good, Your Honor.
6 Thank you.

7 THE COURT: All right. Raise your hand if
8 you run into any problems.

9 All right. Mr. Adams, you wanted to
10 discuss marking some exhibits?

11 MR. ADAMS: Yes, sir. I have two.

12 THE COURT: What I'd like to do, if this is
13 all right with you, since we're going into a new
14 hearing, let's go ahead and mark these as Christopher
15 Garcia Exhibits A and B.

16 MR. ADAMS: Yes, sir.

17 MS. SIRIGNANO: Your Honor, one second,
18 please, because we've got A and B for the DNA
19 hearing. So --

20 THE COURT: I know, but if we're starting a
21 new hearing, I want to have the exhibits running for
22 the hearings rather than just running forever.

23 MS. SIRIGNANO: Okay. Thank you, Your
24 Honor.

25 MR. CASTELLANO: Judge, I don't have any

1 objection to marking those as C and D, Your Honor, if
2 they anticipate an A and B. Whatever the Court wants
3 to do.

4 THE COURT: I think this is going to be A
5 and B, right, Mr. Adams?

6 MR. ADAMS: Yes, Your Honor.

7 MR. CASTELLANO: Your Honor, and Mr. Adams
8 showed me these exhibits during the break. And I
9 have no objection to admission of either one.

10 THE COURT: All right. Anybody else got an
11 objection to these two exhibits? Not hearing any,
12 Christopher Garcia's Exhibits A and B will be
13 admitted into evidence.

14 MR. ADAMS: Thank you, Your Honor.

15 THE COURT: Mr. Adams.

16 EXAMINATION

17 BY MR. ADAMS:

18 Q. Mr. Chavez, let me show you -- and your
19 screen should be on -- Christopher Garcia Exhibit A.
20 Is this the gun that you examined?

21 A. That is correct.

22 Q. And the serial number on that is 4208834?

23 A. That is correct.

24 Q. When did you receive the gun?

25 A. I received the gun prior to 8/25/2016.

1 Q. And when did you return the gun?

2 A. Within a day after 9/22/2016. And if I may
3 indicate where I am -- the green arrow there shows
4 8/25. So that would indicate when the examination
5 started. So we could have received the firearm prior
6 to that. Back down to 9/22, that's the date that
7 indicates when I completed my exams. So the firearm
8 would have been returned after 9/22.

9 Q. And so the record is clear, those dates are
10 found on Defendant's Exhibit A that's in front of you
11 on the screen now?

12 A. That's correct.

13 Q. And is this part of your worksheet that you
14 completed?

15 A. Yes, this is page 1 of 4 of the examination
16 results that would support my laboratory report.

17 Q. Let me show you Exhibit B. This is a chain
18 of custody form. Are you on the chain of custody
19 form?

20 A. I do not recognize this chain of custody
21 form for one reason. This could be a field chain of
22 custody, that being any transactions that are made
23 outside the laboratory, the FBI Laboratory, will have
24 their own chain of custody.

25 Q. And has that been provided with your lab

1 notes, do you know?

2 A. The case 1A should have been provided
3 during discovery requests.

4 Q. So you don't know anything about this
5 Exhibit B, and your name is not on it?

6 A. My name does not appear. However, I do see
7 indications of FBI Laboratory stamped on there, that
8 shows the reasons analysis. But that could have been
9 Joseph -- what I believe is Joseph -- that name looks
10 familiar, as a case agent.

11 Q. Sainato?

12 A. Sainato -- possibly transferring it to the
13 lab, which means out of his custody. But again, I'm
14 not familiar with it, and my name does not appear on
15 this chain of custody.

16 Q. So your sole determination or primary
17 determination is that the was gun was operable when
18 it arrived to you in the laboratory?

19 A. As received, correct.

20 Q. Do you know what condition the gun would
21 have been in when it was seized and taken into
22 custody by the FBI?

23 A. I don't.

24 Q. Do you know whether the gun had been
25 manipulated at all by any case agent or other FBI

1 person before it got released to the FBI laboratory?

2 A. The only policy that was currently in place
3 is that the firearm must be rendered safe, and that
4 is just to allow for it to be packaged accordingly,
5 and shipped under regulations by, I believe, Fed Ex.

6 Q. Would it be against policy for an agent to
7 take a nonoperational gun, and to mess with it, fix
8 it, so that it would fire before sending it to the
9 lab for analysis?

10 A. I'm unaware of any type of policy.

11 Q. One way or another?

12 A. No. The only policy that currently is in
13 place, again, is to ensure that it is rendered safe.
14 If a firearm were to be submitted as inoperable,
15 there is an examination conducted by my unit that
16 would outline on that same worksheet what was not
17 operating. And we would attempt to correct or at
18 least use some of the components to make it
19 functional. But in this case, that did not exist.

20 Q. Why would you do that?

21 A. To collect known test fires. So in order
22 to enter those into the database.

23 Q. And again, for your database information,
24 the eTrace didn't produce any -- the eTrace and the
25 NCIC, and what was the third one?

1 A. ETrace had no record -- excuse me, NCIC had
2 no records; eTrace had a preexisting trace number,
3 meaning someone from the field had already requested
4 the information of that pistol. NIBIN came back as
5 no associations.

6 Q. All right. When had that information been
7 requested on eTrace? Was it related to this
8 investigation, or did it predate?

9 A. May I see Government's Exhibit A again?

10 Q. I have all four pages.

11 A. If you could display it, possibly. So what
12 the arrow is indicating is a trace number. So for
13 me, that indicates for eTrace, that line there,
14 previously traced. I have access to the trace
15 number, but I don't know when that occurred, only
16 that it was during the year 2015.

17 Q. All right. Can you find out when that
18 request was made?

19 A. Yes, I can.

20 Q. Can we ask you to provide that to the
21 prosecution so they can let us know? Or I'm happy to
22 email you.

23 A. I can provide that information.

24 MR. ADAMS: All right. Thank you. I don't
25 have any further questions.

1 THE COURT: Thank you, Mr. Adams.

2 I think I already asked this, but anybody
3 else got any questions of Mr. Chavez on the defense
4 side?

5 All right. Mr. Castellano, if you have
6 redirect of Mr. Chavez.

7 MR. CASTELLANO: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. CASTELLANO:

10 Q. Mr. Chavez, in terms of chain of custody,
11 did someone else at the laboratory have custody of
12 this firearm prior to your examination?

13 A. Yes, they did.

14 Q. What was that purpose?

15 A. The purpose is just the type of examination
16 that is being requested. There are some examinations
17 that would take precedence, like DNA or latents, that
18 would precede our handling of the firearm, to include
19 this is a multiunit submission, meaning that there is
20 a person doing both intake, as well as preparing it
21 for shipment. So there is a request coordinator on
22 this submission. And it serves multiunits, so DNA,
23 latents, and firearms. So I would only be a part of
24 that chain of custody, full chain of custody. The
25 RC, or anyone assisting the RC in packaging, or

1 accepting the firearm at the laboratory, would be the
2 main point of contact for being the first one on the
3 chain, or the last one on the chain.

4 Q. Were you aware of whether DNA testing
5 occurred before the time you handled the firearm?

6 A. Yes, it did occur.

7 MR. CASTELLANO: No further questions, Your
8 Honor.

9 THE COURT: All right. Thank you, Mr.
10 Castellano.

11 MR. ADAMS: No follow-up.

12 THE COURT: All right. Mr. Chavez, you may
13 step down. Thank you for your testimony. May
14 Mr. Chavez be excused from the proceedings, Mr.
15 Castellano?

16 MR. CASTELLANO: Yes, Your Honor.

17 THE COURT: Mr. Adams?

18 MR. ADAMS: Yes, sir. And if we could get
19 that extra follow-up information sooner rather than
20 later, it would be very helpful. Thank you.

21 THE COURT: All right. Any other defendant
22 have any objection to Mr. Chavez being excused? All
23 right. You're excused from our proceedings. Thank
24 you for your testimony, Mr. Chavez.

25 All right. Mr. Castellano, does the

1 Government have further witnesses or evidence -- Ms.
2 Armijo, on this motion?

3 MS. ARMIJO: Yes, we have Tiffany Smith.

4 MS. SIRIGNANO: Your Honor, can I clarify?
5 Is Ms. Smith being called for the firearm or for DNA?

6 THE COURT: I think we're on the firearm
7 motion right at the moment; correct?

8 MS. ARMIJO: Well, I assumed we were still
9 just doing Daubert, in general. She is doing DNA on
10 the firearm, but it is DNA.

11 THE COURT: All right.

12 MS. ARMIJO: So, I guess, I don't believe
13 we have anything more as far as testimony from
14 ballistics on the firearm.

15 THE COURT: All right. Is this still,
16 though, related to one motion, Ms. Sirignano, or is
17 it two separate motions?

18 MS. ARMIJO: I believe it's one motion that
19 they filed challenging all of our Daubert. But I
20 don't know how the defense would want to handle it.

21 MS. SIRIGNANO: Your Honor, the notice that
22 the Government filed, Document 1242, included expert
23 witness testimony of Mr. Chavez and Ms. Smith. So
24 our Daubert challenge was for both experts within
25 their amended notice of expert witness testimony.

1 THE COURT: Well, why don't, before we
2 bring in -- unless Ms. Smith is relevant to
3 Mr. Chavez, why don't we hold off on her and finish
4 up the Daubert hearing on Mr. Chavez. Do y'all have
5 any further witnesses or evidence, Mr. Castellano, on
6 Chavez' Daubert hearing?

7 MR. CASTELLANO: No, Your Honor.

8 THE COURT: All right. Mr. Adams, do you
9 have -- do the defendants have any witnesses or
10 evidence it wishes to present on the Daubert
11 challenge to Mr. Chavez?

12 MR. ADAMS: No, sir. And, Your Honor, our
13 concern had been that he would go farther than the
14 report. If that is the scope of his testimony, we
15 have no objection to that.

16 THE COURT: All right. Is that the
17 position of all the defendants on Mr. Chavez? All
18 right. So Mr. Chavez will be admitted -- will be
19 allowed to offer opinion testimony within the scope
20 of his report and testimony today.

21 All right. Now, let's call Ms. Smith.

22 MS. ARMIJO: And, Your Honor, we're
23 starting fresh, correct? Do you want to start fresh
24 for this?

25 THE COURT: Let's start fresh on Smith's

1 Daubert hearing. Let's take these individually.

2 Ms. Smith, if you'll come up and stand next
3 to the witness box on my right, your left. Before
4 you're seated, my courtroom deputy, Ms. Standridge,
5 will swear you in.

6 TIFFANY SMITH,
7 after having been first duly sworn under oath,
8 was questioned and testified as follows:

9 DIRECT EXAMINATION

10 THE CLERK: Please be seated. State your
11 name for the record.

12 THE WITNESS: My name is Tiffany Smith.

13 THE COURT: Ms. Smith. Ms. Armijo.

14 MS. ARMIJO: Thank you, Your Honor.

15 BY MS. ARMIJO:

16 Q. What is your current occupation?

17 A. I'm a forensic examiner in the DNA Casework
18 Unit of the FBI Laboratory.

19 Q. And what are your responsibilities as a
20 forensic examiner with the FBI?

21 A. As a forensic examiner, it is my
22 responsibility to determine which items of evidence
23 require DNA testing. I will direct a team of
24 biologists to perform that testing in the laboratory.
25 I will review the data of that testing, perform any

1 necessary comparisons between items of evidence and
2 known DNA samples taken directly from individuals. I
3 will then report those comparisons in a report, and
4 then testify if needed.

5 Q. When did you start working for the FBI?

6 A. August of 2010.

7 Q. And have you received any specialized
8 training in the area of forensic DNA analysis since
9 joining the FBI Laboratory?

10 A. Yes. Once I was hired by the FBI
11 Laboratory, I went through a year-and-a-half training
12 program, where I worked alongside qualified forensic
13 examiners, performing the same job duties as I
14 currently perform; however, it was under their direct
15 supervision. I worked on mock items of evidence in
16 the laboratory. I wrote reports that were then
17 reviewed. I took a series of moot court exercises
18 and oral board examinations, and passed a competency
19 test at the end of my training.

20 Q. Now, please describe your work experience
21 prior to joining the FBI.

22 A. Prior to joining the FBI Laboratory, I was
23 a graduate student at West Virginia University, where
24 I worked in a forensic-based research laboratory for
25 three years; that was through the university. I also

1 taught courses relating to, not only DNA, but also
2 forensic DNA. And I also was an intern for a summer
3 at the Connecticut State Forensic Laboratory, where I
4 observed qualified examiners performing multiple job
5 duties at that lab.

6 Q. And what is your educational background?

7 A. I have bachelor's of science degree in
8 forensic and investigative sciences at West Virginia
9 University. And I have a master's in biology degree
10 also from West Virginia University.

11 Q. How do you stay current in your field?

12 A. I stay current in my field by reading
13 articles, attending training at the laboratory, and
14 then sometimes outside laboratory. We receive talks
15 by our DNA Support Unit, which provides us training
16 as well.

17 Q. And have you ever been qualified as an
18 expert in the field of DNA testing before?

19 A. Yes, I have.

20 Q. And can you tell us where and when,
21 approximately.

22 A. I've testified approximately 31 or 32
23 times. Both in New Mexico, in Texas, Oklahoma, North
24 Dakota, Florida, Maryland, Guam, U.S. Virgin Islands.
25 I'm sure there are many others.

1 Q. And have you been qualified as an expert --
2 you indicated in New Mexico, was that in federal
3 court?

4 A. Yes, it was.

5 Q. And do you recall the names of the cases?

6 A. I believe it was U.S. versus Thomas
7 Rodella.

8 MS. ARMIJO: All right. Now, Your Honor,
9 we would ask that Ms. Smith be qualified as an expert
10 in the field of DNA testing.

11 THE COURT: Any objection to Ms. Smith
12 offering opinion testimony in that area? Ms.
13 Sirignano? Anyone else?

14 MS. SIRIGNANO: No objections at this time,
15 Your Honor.

16 THE COURT: All right. Ms. Smith will be
17 allowed to offer opinion testimony in the area of DNA
18 testing.

19 MS. ARMIJO: And, Your Honor, I also
20 have -- I think without objection -- I'm moving in
21 Exhibits 1, 2, and 3, which are Ms. Smith's CV and
22 two lab reports in reference to her testimony today.

23 THE COURT: Any objection, Ms. Sirignano?

24 MS. SIRIGNANO: No, Your Honor.

25 THE COURT: Anyone else?

1 All right. Government's Exhibits 1, 2, and
2 3 will be admitted for this Daubert hearing.

3 Q. Ms. Smith, what is DNA?

4 A. DNA stands for deoxyribonucleic acid. And
5 it is our hereditary material. We receive half our
6 DNA from our mother and half from our father. And it
7 controls not only what we look like, but also
8 controls all the different chemical processes going
9 on within the body.

10 Q. And where is DNA found?

11 A. DNA is found within our cells, and the
12 cells are the building blocks that make up our body.
13 We have skin cells, heart cells, muscle cells; males
14 have sperm cells, and there is DNA in these cells.

15 Q. And does DNA vary from person to person?

16 A. Yes, DNA is unique to a person, with the
17 exception of identical twins. Over 99 percent of our
18 DNA is the same, and that's what makes us human, it
19 gives us two arms, a nose, a mouth. However, there
20 is approximately 1 percent of our DNA that varies
21 between individuals, which makes us unique.

22 Q. And what kind of differences do you examine
23 in DNA?

24 A. For forensic purposes, I look at small
25 regions of the DNA that are repeated back to back.

1 We call these STRs, or short tandem repeats. The
2 number of repeats a person has differs versus another
3 individual. So, for instance, it's similar to the
4 way a train would work, where all trains have an
5 engine and a caboose, but some trains are longer
6 because they have more repeats, or more box cars.
7 And that's the same with DNA testing that I perform.
8 Some individuals may have seven repeats, others may
9 have 10, making them different at locations.

10 Q. And how is DNA typing performed at the FBI?

11 A. There is a series of steps that must be
12 done. The first is a collection, where we have to
13 collect these cells off of an item of evidence, or
14 from a known sample. And this is usually by cutting
15 or swabbing an item. We then go through an
16 extraction process where we're adding chemicals and
17 heat to the item releasing DNA from those cells. We
18 then determine how much DNA we are able to obtain.
19 We then run that through an amplification or copying
20 process. That process will only copy the locations
21 of the DNA that vary between individuals. We will
22 then run it through an instrument, which will
23 generate a DNA profile. I can then compare that DNA
24 profile from an item of evidence to a DNA profile
25 that was taken directly from a known person.

1 Q. And what are the possible conclusions of a
2 DNA test?

3 A. There are two main types of conclusions.
4 The first is an exclusion, and that is when the DNA
5 from an item of evidence is different than the DNA
6 from a known individual, and therefore, we say that
7 person is excluded as a possible contributor to that
8 DNA.

9 The other major conclusion is a match. And
10 that is when the DNA from an item of evidence is the
11 same as the DNA from a known individual. Therefore,
12 we say that person could be a possible contributor to
13 that sample.

14 Q. And how do you determine the significance
15 of a DNA match?

16 A. If we have a DNA match, we have to generate
17 a statistic to show if it is a strong match or if the
18 profile is common in the general population. What we
19 calculate at the FBI Lab is something called a
20 likelihood ratio. It's where we compare alternating
21 hypotheses. The first is: What is the probability
22 of that DNA evidence, given it originated from a
23 certain person of interest. We compare that to the
24 probability of the evidence, given that it originated
25 from a random, unrelated, unknown individual. The

1 larger the number we get, the more support that the
2 DNA originated a certain person of interest.

3 Q. And is it possible to identify the source
4 of the DNA?

5 A. Yes. At the FBI laboratory, when we
6 calculate that likelihood ratio, if the number we get
7 is over 700 billion, then we attribute an individual
8 as the source of the DNA.

9 Q. And what is a mixture?

10 A. A mixture is when you have DNA from more
11 than one individual on an item. So, for instance,
12 multiple people come in contact with an item, and
13 they all are leaving their DNA on that item.

14 Q. How does a mixture affect the possible
15 conclusions from a DNA test?

16 A. It doesn't. The conclusions are the same.
17 You can still compare a person to a mixture, and you
18 can still have an exclusion, meaning a person does
19 not match any of the contributors within that
20 mixture. Or you could also have a match in there,
21 where you would still calculate a likelihood ratio.

22 Q. And how do you know that the results of --
23 that you get are reliable?

24 A. The biologist and examiners that are
25 performing the training or doing the comparisons are

1 both extensively trained. The laboratory itself is
2 an accredited laboratory, which means that an outside
3 body come in to the laboratory and reviews the
4 standard operating procedures and policies, to ensure
5 that the results we are getting are reliable. The
6 DNA unit is specifically also audited yearly, to
7 ensure that we're following quality assurance
8 standards for forensic DNA testing laboratories. And
9 we also run controls of each step of the process.

10 Q. And do you follow protocol that has been
11 set by the FBI?

12 A. Yes, we do.

13 Q. And is that protocol set by anybody else or
14 just the FBI?

15 A. So the FBI has its own protocols and
16 procedures. However, the basis of those procedures
17 has been validated. It's also recommended by SWGDAM.
18 There are other laboratories that are using similar
19 protocols.

20 Q. Let's go on to this specific case. Did the
21 FBI Laboratory receive evidence pertaining to your
22 testimony today?

23 A. Yes, we did.

24 Q. And I'm going to first refer, to assist
25 you -- how many reports did you generate in reference

1 to your testimony?

2 A. Two in reference to this testimony.

3 Q. Now, I'm going to show you first what's
4 been marked as Government's Exhibit 2. Are you
5 familiar with this item?

6 A. Yes, I am. That is a copy of my report
7 that was dated January 3rd of 2017.

8 Q. And can you tell us, in general, what you
9 first did in this case, as far as did you receive
10 items to examine?

11 A. The FBI Laboratory received multiple
12 submissions in this case. When I was assigned to
13 this case, I combined those submissions into one
14 laboratory report. The items of evidence that came
15 up to the DNA Casework Unit were inventoried by our
16 case administrative group. I, then, reviewed the
17 incoming paperwork, and I deemed what should be
18 tested, and directed my biologist to perform that
19 testing.

20 Q. And does Government's Exhibit 2 list the
21 items that you received in this case, which I believe
22 go to exhibit or item number 54 on the second page;
23 is that correct?

24 A. These are the items that I tested in this
25 case. We may have received more.

1 Q. All right. And what was the first step in
2 testing these items as far as your analysis?

3 A. It depends on the items. So, for instance,
4 with the Phoenix Arms pistol and the canvas holster,
5 I directed my biologist to perform DNA testing on
6 those items, which means they would take swabbings of
7 the items. My biologist swabbed the textured
8 portions of the Phoenix pistol. And separately they
9 also swabbed the outside fabric surface of the canvas
10 holster. For the additional items, most of those
11 items started with blood testing.

12 Q. Okay. So, specifically, and what we're
13 here for today, are you referring to items number 3
14 and 4?

15 A. Yes, I am.

16 Q. And what was done with those items after
17 the initial swabbing and examination?

18 A. They went through the routine process,
19 where we collected the DNA, extracted the DNA,
20 eventually amplified the DNA, and generated profiles.
21 I then interpreted those profiles, and wrote this
22 report. At that time, I did not have knowns to
23 compare to these two items, so they were just
24 reported out generally as mixtures of DNA.

25 Q. And specifically with items 3 and 4 -- and

1 I'm now looking at, I believe, page 3 of Exhibit 2.
2 Does that contain -- what were your results from item
3 number 3 and item number 4?

4 A. For item number 3, I did get a mixture of
5 DNA, which again means that more than one person came
6 in contact with that item. And I also look at a sex
7 determining region, to tell whether the DNA came from
8 males or females. And in this case, it came from
9 both a mixture of male and female DNA.

10 Q. And what about for the swabbing from the
11 outside surface of the holster?

12 A. For the holster, again, it was a mixture of
13 DNA. And so, therefore, again, that means that more
14 than one person came in contact with that item.
15 However, from the sex typing results here, I detected
16 male DNA.

17 Q. Now, you can't tell when a person left the
18 DNA on there, can you?

19 A. No, I cannot.

20 Q. So after you did the testing on this, did
21 you then generate this report?

22 A. Yes, I did.

23 Q. And, in fact, you indicate on items number
24 3 and 4 that the mixture is suitable for comparison
25 purposes; correct?

1 A. That is correct.

2 Q. So what would you expect to get after
3 listing that on the report?

4 A. After that report, I was hoping to get
5 potential known reference samples, which are known
6 samples taken directly from a person, in order to do
7 comparisons to those items.

8 Q. And did you get that in this case?

9 A. I did, yes.

10 Q. All right. Now, I'm going to show Exhibit
11 3. Are you familiar with this item?

12 A. I am, yes.

13 Q. Tell us what we're looking at?

14 A. This is a buccal sample from Mr.
15 Christopher Garcia. And a buccal sample is a cheek
16 swab that is taken directly from a person. And we
17 treat this as a known reference sample, meaning we
18 know where the DNA came from on this item.

19 Q. And what you do with that sample? And I
20 believe it's item number 58; is that correct?

21 A. That is correct. The same process was done
22 on item 58 as the previous items. We took a cutting
23 of the buccal sample. The biologist then performed
24 the same extraction, quantification amplification
25 steps. Eventually, a profile was generated. I,

1 then, reviewed that profile, and I was able to
2 compare that profile back to the Phoenix Arms pistol,
3 in addition to the holster.

4 Q. And what were your conclusions based on
5 that?

6 A. So for the Phoenix Arms pistol, I compared
7 the DNA profile from that pistol to Mr. Garcia. When
8 I did that comparison, I was not able to visually
9 exclude him as a possible contributor. Therefore,
10 when I interpreted this pistol, I interpreted the DNA
11 as originating from four individuals. When I ran the
12 statistic for Mr. Garcia, it was determined that the
13 DNA typing results for the pistol were at least 28
14 times more likely to -- if they originated from
15 Mr. Garcia and three unrelated, unknown individuals
16 than if they originated from four unrelated, unknown
17 individuals. So this provided moderate support that
18 Mr. Garcia is a contributor to the DNA from the
19 Phoenix Arms pistol.

20 Q. Now, in reference to the holster, did you
21 get different results from the holster?

22 A. From the holster, I also interpreted that
23 holster as originating from four individuals. From
24 that holster, when I compared it to the DNA from the
25 holster to Mr. Garcia, he again matched that profile.

1 When I calculated my likelihood ratio, it was over
2 our threshold of 700 billion, so therefore, I was
3 able to satisfy that Mr. Garcia is the source of one
4 of the contributors on that holster.

5 Q. Now, tell us a little bit about what you
6 mean about it was greater than your -- what term did
7 you use?

8 A. We have a threshold. So when we calculate
9 that likelihood ratio, as that number increases, the
10 more support that a certain person of interest is
11 included as a contributor. So once that likelihood
12 ratio reaches 700 billion, we no longer report the
13 likelihood ratio, we just state that an individual is
14 the source of the DNA.

15 Q. And do you know from your notes
16 approximately what the ratio was?

17 A. I don't recall specifically. But I do
18 believe it was in the quadrillions.

19 Q. Quadrillions?

20 A. Yes.

21 Q. And as far as -- do you know approximately
22 how many people there are on Planet Earth?

23 A. There is approximately 7, 7 and a half
24 billion people.

25 Q. There is obviously a difference in the

1 numbers between the holster and the firearm; is that
2 correct?

3 A. That is correct, yes.

4 Q. Okay. And what sort of things could impact
5 that?

6 A. It depends on how much DNA is present. It
7 depends on if Mr. Garcia is, in fact, a true
8 contributor. If he is not, then the number would be
9 expected, potentially, to be lower. It also depends
10 on how many people handled a certain item, and in
11 what order. So, for instance, if one person handled
12 the item first, and then multiple people handled it
13 later, that could potentially limit their ability.
14 So it's really hard to say specifically. But there
15 are a variety of reasons.

16 Q. Now, in general, with DNA, do you know how
17 long DNA has been used in the scientific world for
18 testing in forensics?

19 A. It's been used since the '80s. However,
20 specifically, the type of testing we currently are
21 using, the FBI has been doing it since 1999.

22 Q. And is it generally accepted in the
23 scientific communities?

24 A. Yes, it is.

25 Q. And does the FBI maintain the standards for

1 that type of testing, I should say?

2 A. Yes, we do.

3 Q. And is that part of your accreditation?

4 A. Yes, it is.

5 MS. ARMIJO: May I have just a moment, Your
6 Honor?

7 THE COURT: You may.

8 Q. Now, when you request a sample from a
9 person to make your matches, do you just use -- do
10 you use the swab from an arrest, or what is it
11 exactly that you use?

12 A. We are not allowed to use swabs from time
13 of arrest. Those are specifically collected for
14 entry into a database searching purposes. For direct
15 comparison to items of evidence, we do require a new
16 sample to be collected.

17 MS. ARMIJO: All right. Thank you. I'll
18 pass the witness, Your Honor.

19 THE COURT: Thank you, Ms. Armijo.

20 Ms. Sirignano, do you want to start?

21 MS. SIRIGNANO: Thank you, Your Honor.

22 THE COURT: Ms. Sirignano.

23 MS. SIRIGNANO: I'm going to need a minute,
24 Your Honor.

25 THE COURT: Certainly.

1 MS. SIRIGNANO: Thank you, your Honor.

2 With the Court's indulgence, I'm going to
3 ask Ms. Torraco to vacate there, so we have a little
4 more room.

5 THE COURT: Are you agreeable with that,
6 Ms. Torraco?

7 MS. TORRACO: Yes, Your Honor.

8 THE COURT: Thank you, Ms. Torraco.

9 MS. SIRIGNANO: Your Honor, Ms. Gilbert is
10 here at the podium with me because we're going to use
11 Trial Director in this cross-examination.

12 THE COURT: All right. Ms. Gilbert, good
13 morning to you.

14 MS. SIRIGNANO: Your Honor, may I approach?

15 THE COURT: You may.

16 EXAMINATION

17 BY MS. SIRIGNANO:

18 Q. Good morning, Ms. Smith.

19 A. Good morning.

20 Q. I'm handing you what's been marked CG-A and
21 DNA on the bottom. Do you recognize that? It's
22 approximately 317 pages.

23 A. Yes, I do. It is a copy of my original
24 case file for the first submission.

25 Q. And when you say "the first submission,"

1 that would be items 3 and 4 that you just previously
2 testified about?

3 A. Correct. They're the first submissions for
4 myself. It was, I believe, the third or fourth
5 submission for the laboratory. But yes, that's what
6 I'm referring to.

7 Q. And that would be the alleged gun and the
8 holster in this case?

9 A. That is correct.

10 MS. SIRIGNANO: Your Honor, I'd like to
11 move for admission of CG-A DNA at this time?

12 THE COURT: All right. CG-A. All right.
13 Any objection, Ms. Armijo?

14 MS. ARMIJO: No, Your Honor.

15 THE COURT: Any objection from the other
16 defendants? All right. Christopher Garcia's Exhibit
17 A will be admitted for this Daubert hearing.

18 MS. SIRIGNANO: Thank you.

19 Q. Ms. Smith, can you take a look at this
20 exhibit, please? What is it?

21 A. This is the case file from my second
22 report.

23 Q. And so you recognize it as your case file?

24 A. Yes, I do.

25 Q. And when you say the "second report," that

1 would be the report you did regarding Mr. Garcia's
2 buccal swab?

3 A. That is correct.

4 MS. SIRIGNANO: Your Honor, at this time,
5 I'd move admission of Mr. Garcia's CG-B DNA.

6 THE COURT: Any objection, Ms. Armijo?

7 MS. ARMIJO: No, Your Honor.

8 THE COURT: From any other defendant?

9 All right. Christopher Garcia's Exhibit B
10 will be admitted into evidence for this Daubert
11 hearing.

12 Ms. Sirignano.

13 MS. SIRIGNANO: Thank you, Your Honor.

14 Q. So Ms. Smith, I'm just going to talk a
15 little bit about your background and your previous
16 testimony about the two reports, Government's 1 and
17 2. And you said that you have biologists that do the
18 work for you; correct?

19 A. That is correct. The FBI laboratory has a
20 team approach, where we have examiners that direct
21 the testing and they oversee all the testing. The
22 decisions are made by the examiners. The comparisons
23 and interpretations are made by the examiners.
24 However, we do have biologists that perform the
25 hands-on testing in the lab.

1 Q. And so what's part of your review?

2 A. I review the biologists' notes, I review
3 the profiles that were generated. I review the
4 incoming paperwork of the items prior to them being
5 tested at the laboratory. I review the entire case
6 file.

7 Q. And that's what you have in front of you in
8 Exhibits CG-A and CG-B DNA; correct?

9 A. That is correct. These are copies of my
10 case file.

11 Q. Which includes the biologists' reports as
12 well; correct?

13 A. That is correct, yes.

14 Q. And so in so much you review their work,
15 you adopt their work as well?

16 A. I do. I'm in constant contact with the
17 biologists. So, as they're performing testing, if
18 they have any questions, they will come seek me out.
19 If they have no questions, then I will just review
20 their notes, make sure there are no issues, and then
21 write my reports based off those.

22 Q. And you, yourself, do not do any instrument
23 testing, or you did not do any instrument testing for
24 these two reports, Government's Exhibits 1 and 2?

25 A. That is correct. The biologists would do

1 that.

2 Q. And so what would happen if you found an
3 error in one of the biologist's reports or notes?
4 What's the process?

5 A. It depends on what the type of error is.
6 If the error is an administrative error, such as a
7 spelling discrepancy, I would just correct the
8 spelling discrepancy. If it is something that I
9 cannot just correct, I will go seek out the
10 biologists, have a conversation with them, and make
11 any adjustments as needed. If there is an error
12 affecting their work, then it would be brought up to
13 a technical leader. And then the decision would be
14 made from that point on from our quality program.

15 Q. So you would review a report first, and
16 then, if there was an error, then it would go to a
17 technical leader for review?

18 A. That's the normal process. It really just
19 depends on the type of error. If it was an
20 instrument error, we may just proceed with a new
21 instrument. It really just depends on the specific
22 situation. In this case, there was no noted error,
23 so I don't have any of those issues in this case.

24 Q. Can you talk a little bit about your error
25 rate with this particular program, STRmix?

1 A. There is no documented error rate for
2 STRmix, as we use it at the laboratory. The STRmix,
3 if it has an error while running, we will re-run the
4 program. But there is no calculated error rate.

5 Q. And at times, when you re-run the sample,
6 do you get different findings than the first run,
7 when you read -- when -- a sample as an error?

8 A. Yes, if there is an error, then it means
9 the software will not complete properly. So when you
10 re-run the software, you will get the correct value.

11 Q. And how many times in your history with the
12 FBI have you had to do that?

13 A. I can only think of one to two, maybe,
14 instances. And that was because the DNA types that
15 were seen were not separated fully because of how
16 close in size they were. So STRmix was not able to
17 handle that specific instance. So I ignored that
18 location.

19 Q. You talked with Ms. Armijo on direct
20 examination that the DNA unit has manuals and
21 protocols and procedures; correct?

22 A. That is correct, yes.

23 Q. Do you have any of those with you here
24 today?

25 A. I do not have them with me, no. They were

1 provided on a CD, on discovery. But I don't
2 typically bring those with me on testimony.

3 Q. So they were provided to the Government?

4 A. Yes. So copies of my protocols that were
5 relevant to the case as well as my case files are
6 typically handed over on discovery, as part of our
7 quality assurance program.

8 Q. When was that handed over?

9 A. I don't know specifically. Once we get a
10 discovery request in, our normal process is to make
11 copies of the case files, also provide copies of our
12 protocols. Those are handed over to our legal
13 department. And from my understanding, our legal
14 department mailed them December 7, via an email I
15 received. So I don't know specifically when they
16 were received or anything like that.

17 Q. December 7th of 2016?

18 A. Of 2017.

19 Q. 2017. Was that last week?

20 A. Based on the email, I have, yes.

21 MS. SIRIGNANO: Your Honor, at this time,
22 I'd like to ask for the Government to turn over those
23 policies and procedures that were turned over by
24 Ms. Smith as part of the discovery process.

25 THE COURT: Any response on that, Ms.

1 Armijo?

2 MS. ARMIJO: Your Honor, I will check to
3 see if they were disclosed yet. I know that I was
4 handed today a CD that was sent on December 14 to
5 Special Agent Nancy Stemo. But, in looking at it
6 this morning, I didn't see policies and procedures,
7 but I'll have to have somebody else go look at it.
8 But it was sent to Nancy Stemo on the 14th. So I'm
9 trying to figure out -- it is true the legal people
10 said that they sent it to us on December 7th, which
11 means that we, at least New Mexico, would have
12 received it. I'm trying to track that down to see if
13 that was disclosed or not. I believe what I have in
14 my hand today is from a different examiner and
15 different report. So I will be tracking that down,
16 and certainly have no objection to turning it over,
17 if it has not already been disclosed.

18 THE COURT: All right. Ms. Sirignano?

19 MS. SIRIGNANO: Your Honor, it has not
20 already been disclosed. And the Government did know
21 that we were having this hearing today. I did file,
22 as the Court requested, over the weekend, a
23 declaration from our expert, Janine Arvizu, regarding
24 the need for the protocols and procedures in order to
25 properly do an audit.

1 And I'm also getting a sworn declaration
2 affidavit from Dr. Dan Krane, regarding -- he's a DNA
3 expert in this case -- regarding the need to have
4 those SOPs, policies and procedures, in order to
5 discuss the extraction process, the quantitative
6 results of the DNA, the amplification process, the
7 instrument calibration, and then the comparison of
8 the result to the known person.

9 So, Your Honor, I would submit that I need
10 those documents in order to properly do a
11 cross-examination.

12 THE COURT: Well, do the best you can. And
13 then we'll see if the Government can find those and
14 get them in your hands pretty quickly.

15 MS. SIRIGNANO: Thank you, Your Honor.

16 Q. So is it normal procedure for you, as an
17 examiner, when you have produced a report, to provide
18 your reports and the SOPs, manuals, policies and
19 procedures, to the United States Attorney's Office?

20 A. We do, once requested. So I work --
21 typically, I have 30 or so cases assigned to me at
22 once. And most of those don't ever go to trial. So
23 when the attorney requests a discovery, that's when
24 we would hand over all of our materials. We would
25 hand over copies of our case files, and then also

1 copies of our standard operating procedures. So it's
2 not every case. It's only when requested.

3 Q. And that's routine; policies and procedures
4 manuals go along with the case file when you have
5 notice of litigation; correct?

6 A. That is true. It depends on the case.
7 Sometimes it's a little more complicated. So for a
8 case like this, where there are many submissions,
9 sometimes the legal team in order to expedite the
10 process, will send out things piecemeal. Usually,
11 they'll try to send it out in all one packet. But
12 because this case is still ongoing at the laboratory,
13 there are still open examinations at the laboratory,
14 they may or may not have sent it in different
15 packets. I'm not sure specifically to that.

16 Q. Thank you.

17 So you testified earlier that DNA has been
18 around since 1999; correct?

19 A. The DNA testing that we specifically
20 perform at the lab, the STR, short tandem repeats,
21 has been around since '99 at the FBI Laboratory.

22 Q. Short tandem repeats?

23 A. Correct.

24 Q. Now, tell us a little bit about the -- you
25 used a STRmix computer program to perform the STR, or

1 short tandem repeat testing in this case; correct?

2 A. STRmix was not used for the testing. It
3 was used for the interpretation calculation of a
4 likelihood ratio after the testing was completed.
5 STR testing itself is the actual process by which the
6 DNA is copied and the profile is generated. But
7 STRmix is a tool that we use to generate likelihood
8 ratios and to do mixture deconvolution, or separation
9 of contributors in a mixture.

10 Q. So how is STRmix different than the
11 previous method that the FBI was using before the FBI
12 adopted STRmix?

13 A. The previous method threw out a lot of
14 information. It was called a combined probability of
15 inclusion. It's still a valid method to use;
16 however, if you have low level samples, you cannot
17 include multiple locations in your statistic
18 calculation. So you are actually -- as an examiner,
19 you're not able to use the information or all the
20 information that was present.

21 STRmix is a continuous model that models
22 for different processes within the DNA process. It
23 models for drop-out. So if you're missing
24 information, it actually has modeling for that. It
25 also can model artifacts that can be seen. So it's a

1 better tool that utilizes the entire profile, versus
2 just parts of the profile.

3 Q. So it's not a human analysis by any means;
4 correct?

5 A. There is definitely human involvement. So,
6 as an examiner, I first do a visual comparison to see
7 if I believe the individual can be visually excluded.
8 If a person is visually excluded as a contributor, I
9 do not run STRmix. I actually do that step first.
10 If I cannot visually exclude an individual, I will
11 then run STRmix. But I must review the output of
12 STRmix. So the report that STRmix generates, I
13 review that report as well.

14 Q. So did you do a visual comparison in this
15 case?

16 A. I did, yes.

17 Q. And what were your results?

18 A. I cannot visually exclude Mr. Garcia to
19 either the holster or the pistol; therefore, I ran
20 STRmix for both items.

21 Q. And is that reflected in your reports?

22 A. That's just part of our procedure. So it's
23 not specifically laid out in the report. However, if
24 there was an exclusion, it would state that I
25 excluded in that report. It would say an individual

1 is excluded in the report.

2 Q. And what did you visually compare?

3 A. The DNA profile from Mr. Garcia to the DNA
4 profile from both holster, as well as the pistol.

5 Q. So let's be a little bit more certain with
6 what we're talking about here. So you called the DNA
7 profile from Mr. Garcia, item 58(1)a; correct?

8 A. I'm not sure what you're referring to. The
9 parentheses one at the end?

10 Q. Yes.

11 A. That is just the collection item. So it's
12 actually just item 58. But in the collection notes,
13 it will have the parentheses, because that's part of
14 the software we use to track the sample. It
15 automatically adds that. But in my report it would
16 just be item 58.

17 Q. And then the firearm was item 3; correct?

18 A. Correct.

19 Q. And the holster you identified as item 4;
20 correct?

21 A. That is correct.

22 Q. So you compared the DNA profile of item 58
23 with item 3 and item 4; correct?

24 A. That is correct, yes.

25 Q. Okay. And when you say the DNA profile,

1 what actually are you looking at?

2 A. I'm looking at alleles, or DNA types, that
3 are present at each location. So in STR testing --
4 at the time the holster and the pistol was tested, we
5 were looking at a kit that looks at 15 STR, or short
6 tandem repeat, locations. Each of these locations
7 has DNA types present at them. The totality of all
8 15 types is what I'm referring to as a DNA profile.

9 With Mr. Garcia, I was using a different
10 kit that actually looks at 24 DNA locations. And I
11 compared those profiles to the previously tested
12 evidence items.

13 Q. Okay. So let's go into that a little bit.
14 What's an allele?

15 A. An allele is a DNA type at a location. So,
16 for instance, if you receive seven repeats from your
17 mom, then that would be called a seven allele. If
18 you receive 10 from your dad, that would be a 10
19 allele. Your DNA profile at that location would be a
20 7/10. It's a combination of both alleles together
21 which makes up your DNA profile.

22 Q. And the kit that you use to test the
23 firearm and the holster is called what?

24 A. Identifiler.

25 Q. And how many locations does it test?

1 A. It looks at 15 locations, in addition to a
2 sex determining region.

3 Q. Then you used a different kit for the
4 buccal sample, correct, item 58?

5 A. That is correct. And that's because the
6 buccal sample came in approximately a year later. So
7 at that time, we were no longer using Identifiler.
8 We were using a new kit called GlobalFiler, which
9 looks at 21 locations, and then three sex-determining
10 locations, for a total of 24.

11 Q. And why did the FBI go to the GlobalFiler
12 kit?

13 A. We went to the kit because it looks at more
14 locations, therefore, it has more discrimination
15 potential. In addition, one of the main reasons is
16 CODIS, which is the DNA database, is going to be
17 switching to more locations in the future. And so it
18 was recommended -- or mandated -- that all
19 laboratories that participate in CODIS, which is the
20 Combined DNA Index System, or that database, start
21 using more up-to-date kits that have more locations.

22 Q. So I'd like to talk to you a little bit
23 about this STRmix program.

24 Can you pull up CG-B 25, please.

25 Ms. Smith, what's this?

1 A. This is the evidence check-in notes that my
2 case administration group documented as the item was
3 received into the DNA Casework Unit for the item 58
4 buccal sample for Mr. Garcia.

5 Q. And in terms of relevant considerations for
6 STRmix, the STRmix program only asks specific
7 questions that you or the analyst or the examiner
8 puts into the program; correct?

9 A. That is correct, yes.

10 Q. And so with your hypotheses, you just
11 compare Mr. Garcia's item 58, the buccal sample, with
12 items 3 and 4; correct?

13 A. That is correct. I do it individually,
14 yes.

15 Q. Can you pull up CG-A 17.

16 Ms. Smith, do you recognize this document?

17 A. I do. That is the incoming lab exam
18 request from the field, when the items -- the pistol
19 and the black holster were submitted to the
20 laboratory. This is the documentation I received.

21 Q. You received this from whom?

22 A. This would come from the FBI agent
23 submitting the evidence to the lab, or any other
24 contributor, when they submit evidence to the lab,
25 they're required to fill out either a lab exam

1 request or a letter.

2 Q. And this is an electronic communication
3 from Agent Sainato; correct?

4 A. Yes, that is correct.

5 Q. In the Albuquerque Division?

6 A. Yes, that is correct.

7 Q. Part of that request is, it states at the
8 bottom of that the page that entity, Mario Montoya,
9 is known to have touched items; correct?

10 A. It is listed as that, yes.

11 Q. Entity Christopher Garcia is believed to
12 have touched items; correct?

13 A. That is correct. That is also listed.

14 Q. At any point in time in your review of
15 items 3 and 4, did you consider Mario Montoya's DNA
16 as part of your testing and analysis?

17 A. I did not receive a sample from Mr.
18 Montoya, no.

19 Q. Why?

20 A. One was not provided.

21 Q. So you did not consider Mr. Montoya's DNA
22 in your findings then?

23 A. Unless a sample is submitted from
24 individuals, I cannot consider them in my findings,
25 no.

1 Q. But from this electronic communication, you
2 know from the agent that entity Mario Montoya is
3 known to have touched the item; correct?

4 A. That is correct. And that's part of the
5 misconception, is that DNA, we cannot use samples
6 from databases for direct comparisons. So these
7 individuals are listed under the assumption that
8 either us or latent fingerprints can pull their
9 samples for direct comparison. But, legally, DNA is
10 not allowed to do that. And so the agent would have
11 had to submit known reference samples directly to us,
12 in order for me to do those comparisons.

13 Q. And Mr. Mario Montoya is a government
14 cooperating witness; correct?

15 A. I do not know specifically who he is, no.

16 MS. SIRIGNANO: Your Honor, may I approach?

17 THE COURT: You may.

18 MS. SIRIGNANO: Can you pull up CG-E DNA?

19 Q. Ms. Smith, do you recognize this document?

20 A. I do not. It's between Agent Sainato
21 and -- it looks like a different employee with the
22 laboratory. Not myself.

23 MS. SIRIGNANO: One moment, please, Your
24 Honor.

25 Q. Ms. Smith, we've already determined that

1 Agent Sainato was the case agent in Albuquerque
2 submitting evidence to the lab; correct?

3 A. That is correct, yes.

4 Q. And in this email -- Sherine Ali is a
5 fingerprint examiner?

6 A. Yes, I believe so, yes.

7 Q. Do you know Ms. Ali?

8 A. I do not, no.

9 Q. So in looking at this email, Agent Sainato
10 advises Ms. Ali -- and I'm going to quote from it, in
11 the middle of the page -- "We're just hoping that
12 Mr. Garcia's DNA fingerprints will be on the gun
13 and/or holster for additional confirmation"; is that
14 correct?

15 A. That's what it states in this email, yes.

16 Q. And then on the top of the page it says,
17 "You were interested in DNA examinations, but because
18 of the nature of the evidence, DNA examinations would
19 not be performed for these items." Correct?

20 A. That is also in a separate email, yes.

21 Q. So you've never seen this document before?

22 A. No, we don't typically have all the emails
23 from the other units in between the agents and other
24 laboratory examiners. Just like they wouldn't
25 necessarily have our emails. So, no, I have not read

1 this email.

2 Q. You were told by the FBI Albuquerque that
3 they were hoping to find Mr. Garcia's DNA on items 3
4 and 4?

5 A. I was not told that specifically. It was
6 listed in a lab exam request, that they believe
7 Mr. Garcia may have been in contact or handed this
8 item over. So they were expecting, potentially, his
9 DNA to be on this item. Yes, that was in the lab
10 exam request that was previously shown.

11 Q. That was the last document that I pulled up
12 on the visualizer; correct?

13 A. That is correct, yes.

14 Q. So you have knowledge that Mr. Garcia,
15 perhaps, had touched these items; correct?

16 A. Yes. That was listed in the lab exam
17 request, that he may have handed those over, yes.

18 Q. So how do you overcome any kind of bias
19 from knowing that he might may have touched these
20 items?

21 A. I perform the -- so for -- in this case,
22 the comparison was performed over a year later. I
23 could not visually exclude, because Mr. Garcia's DNA
24 types were consistent with those on the firearm. So
25 I ran STRmix. And STRmix doesn't have any bias

1 potentially incorporated within the software. It
2 does a mixture deconvolution first, before it even
3 looks at the known. And then it also will, at that
4 point, compare the known and calculate a likelihood
5 ratio based off that. So there would be no bias
6 associated with this.

7 Q. But without having Mr. Montoya's profile to
8 consider, you've got a huge gap in the statistical
9 analysis with STRmix; correct?

10 A. This would be independent of any additional
11 contributors. Because on both firearm and the
12 holster there is a mixture of four individuals on
13 each of them. So I do expect other people to
14 potentially match both of these items.

15 Q. But you can't rule out Mr. Montoya one way
16 or the other; correct?

17 A. That is correct. I cannot rule out anyone,
18 because I did not receive any additional known
19 reference samples.

20 Q. And at no point in time did you go back to
21 the laboratory, after you saw that incoming
22 electronic communication, and say, Hey, can you
23 please get a DNA sample from Mr. Montoya so I can use
24 it in my comparison; correct?

25 A. No, I did not. And, again, this case,

1 because there were so many submissions going on at
2 once, I wasn't sure, originally, who needed to be
3 compared to what. We had other buccal samples and
4 unrelated submissions. And so, at that time, I did
5 not request any additional knowns. The Garcia sample
6 came at a later date, directly to me.

7 Q. So you've got a big gap in your mixture and
8 your analysis profile, without Mr. Montoya's DNA
9 profile; correct?

10 A. I don't think that has anything to do with
11 Mr. Montoya's sample. Again, there was a four-person
12 mixture on both the holster and on the firearm. When
13 I compared Mr. Garcia, I could not visually exclude
14 him from either.

15 One of those items, the holster, there was
16 much stronger support for Mr. Garcia being a
17 contributor, because that likelihood ratio was
18 greater than 700 billion.

19 For the gun, the likelihood ratio that I
20 calculated was 28. But that would be independent of
21 any other individuals.

22 Q. But it's safe to assume that Mr. Montoya
23 could be one of those three or four unknown
24 individuals that was not properly analyzed; correct?

25 A. He could be one of the contributors. I

1 would not say it was not properly analyzed. However,
2 he was not analyzed because I never received a sample
3 from him.

4 But, again, when we receive samples from
5 the laboratory, we run every individual separately,
6 or independently from the item. So we wouldn't --
7 having Mr. Montoya's sample would not have changed my
8 comparison to Mr. Garcia.

9 Q. Okay. Let's look at CG-B 62, please.

10 MS. SIRIGNANO: Your Honor, we need a
11 moment here. I apologize.

12 THE COURT: That's all right.

13 MS. SIRIGNANO: Thank you, Your Honor.

14 THE COURT: Certainly.

15 MS. SIRIGNANO: I love technology.

16 Q. Ms. Smith, you recognize this document CG-B
17 062?

18 A. I do. This is the STRmix output report
19 that was generated in reference to the firearm.

20 Q. And it's a number of pages in length;
21 correct?

22 A. Correct. It is listed as 20 pages.

23 Q. That's down at the bottom of the document;
24 correct?

25 A. That is correct, yes.

1 Q. And so looking at this document, and the
2 title, "Summary of input data," this shows that you
3 used the IDplus version 2.4; correct?

4 A. That is correct.

5 Q. You determined there were four contributors
6 in this sample?

7 A. Yes, I did.

8 Q. And the input files are items 3 1A;
9 correct?

10 A. That is correct.

11 Q. That would be the firearm?

12 A. Correct.

13 Q. And then the known contributors under the
14 hypothesis is item 58(1); correct?

15 A. That is correct.

16 Q. That is Mr. Garcia's buccal sample?

17 A. Correct.

18 Q. And so why is the next column "known
19 contributors under Hd" blank?

20 A. The way the STRmix works is if you have no
21 additional individuals that you know for a fact will
22 be on that item, that would be left blank, and it's
23 just unknown contributors at that point. So, for
24 instance, the known contributors under Hd for this
25 would be four unrelated unknown individuals.

1 Q. But you knew from the electronic
2 communication that Mario Montoya had touched this
3 firearm; correct?

4 A. It was listed as a contributor, but I did
5 not have Mr. Montoya's sample when this analysis was
6 run. And I still do not have that sample. If I had
7 that sample, if we know that the firearm was touched
8 by him, I could include him as both a known
9 contributor under both Hp and Hd. But, again, I do
10 not have the sample.

11 Q. So you've got a big gap in your analysis
12 here, because the known contributor, Mario Montoya,
13 his DNA wasn't run; correct?

14 A. I do not have a big gap here. This is a
15 normal process for when we have only one buccal
16 sample. This is how it normally would be. So there
17 is not a big gap in this analysis.

18 Q. But knowing that he did touch the firearm,
19 you could have run the sample, and it would have been
20 more accurate, had the sample been run; correct?
21 Instead of four unknown individuals?

22 A. Without having his known sample -- just
23 because an individual comes in contact with a
24 firearm, it does not mean their DNA would be present.
25 So I can't say that Mr. Montoya would even be

1 conditioned on here, which is when we include someone
2 under Hd. Because without having his known, I don't
3 know if his DNA was present on that item. So I don't
4 want to make an assumption that it was, because I
5 don't have that sample.

6 Q. Can you pull up CG-B 065, please?

7 MS. SIRIGNANO: I apologize, Your Honor.

8 Q. Ms. Smith, this is Document 56. Do you
9 recognize it?

10 A. Yes, I do recognize this. This is, again,
11 a page of the STRmix output file.

12 Q. And in the middle of the page it says
13 "parameters"; correct?

14 A. That is correct.

15 Q. These are the input values that the FBI
16 enters into the STRmix program?

17 A. Those are the parameters that are entered
18 based off of our validation. So those will remain
19 identical every time.

20 Q. And that's the FBI's validation, right?

21 A. That is correct. When the FBI goes online
22 with any type of software or kit, we have to validate
23 that kit for use in our hands. And it was the same
24 for STRmix. So these are the parameters that are
25 locked into the software so that the user cannot

1 change them.

2 Q. And these parameters that are locked in
3 were derived by the FBI; correct?

4 A. The FBI's DNA Support Unit, who did the
5 validation, along with ESR, which is the individuals
6 who developed STRmix. Both the validation and these
7 parameters were determined in combination of the two.

8 Q. What's the ESR? I'm sorry, I missed that.

9 A. The ESR, it's Environmental Science and
10 Research Institute. It is the organization that
11 developed STRmix. They did their own developmental
12 validation first. They, then, trained us on STRmix,
13 and they assisted us in our internal validation.

14 Q. Is that an outside agency?

15 A. That is, yes.

16 Q. So it's proprietary software that the FBI
17 has purchased?

18 A. That is correct. It is software that is
19 available for purchase. And there is multiple
20 laboratories using it currently.

21 Q. And are part of co-developers of the
22 Environmental Science Research Unit, John Buckleton;
23 correct?

24 A. Yes.

25 Q. James Curran?

1 A. Yes.

2 Q. And Jo-Anne Bright?

3 A. That is correct, yes.

4 Q. So they're the co-developer of STRmix.
5 Anyone else?

6 A. I don't know specifically. I believe there
7 was a Mr. Duncan -- but I don't recall his exact
8 involvement. I'm sure there are multiple other
9 individuals, though, involved, but those are the main
10 three.

11 Q. So towards the bottom of that page, there
12 is a box called "stutter variance," and there is a
13 value next to that. Can you explain that?

14 A. This value specifically came from our
15 validation, using part of the software that actually
16 allows you to run single source samples through the
17 software, to generate how much variance is on average
18 that you're seeing. So this is based off of, again,
19 that validation. Specifically, how it was derived
20 would have come from the DNA Support Unit.

21 Q. Okay. But what's stutter?

22 A. Stutter is an artifact of the amplification
23 process. So when you are copying the DNA, there
24 are -- a very common occurrence is that the DNA
25 strand can slip during that copying. That creates a

1 stutter peak, which is one base pair shorter than the
2 parent. So, for instance, if a person has a seven
3 allele, you will see a very, very small peak at
4 potentially the six location, just due to natural
5 stutter.

6 Q. So it's like a natural error, a natural
7 anomaly in the amplification process?

8 A. I wouldn't call it specifically an error.
9 It's a known artifact. So this is something that can
10 be reviewed by an examiner. It's also part of our
11 validation, where we estimate what those stutter
12 percentages should be at each of the different
13 locations. And so, like I said, it's part of the
14 process.

15 Q. And can you explain what drop-in is?

16 A. Drop-in is when alleles that may not be
17 present in the profile show up in the profile, just
18 due to natural contaminant. We did not see any
19 drop-in in our validation, so it's set at zero. We
20 did not see it in any of the samples we ran at the
21 parameters we set it at. We do not see drop-in, so,
22 therefore, we do not include it, and therefore is set
23 as zero in our parameters here.

24 Q. So drop-in cap, drop-in frequency, drop-in
25 parameters, which is part of this document, it's all

1 been zeroed out; correct?

2 A. That is correct, yes.

3 Q. So the FBI DNA Support Unit, with their
4 validation, is saying that there is zero natural
5 contaminant in all your samples?

6 A. Based off of the settings we run our
7 samples at. For instance, when we're doing the
8 amplification process, our normal process, through
9 the thousands of samples we analyzed with known
10 profiles, we saw no instances of drop-in at the set
11 parameters. We set our parameters based on the fact
12 that we did not want to see any drop-in. So we set
13 all of our thresholds above any potential drop-in.
14 That can typically be seen with very low level
15 samples that are run through an increased sensitivity
16 testing, which we do not do at the FBI Laboratory.

17 Q. So what you're saying is that there is no
18 natural contaminant at all with your samples, based
19 on your zero values entered?

20 A. It's different. So contamination can
21 happen. So, if a person sneezes while they're
22 processing the evidence, their sample could show up
23 on an item. It did not happen in this incidence, but
24 that can happen. That's not what I'm referring to
25 here. Drop-in is just when, if you know a person's

1 DNA profile, you just see a very small DNA peak that
2 shouldn't -- that doesn't belong there, it's just
3 natural from the environment. And we do not see any
4 of that instance in our validation, based off of the
5 way we process our samples.

6 Q. Well, the peaks are really important in the
7 analysis; correct?

8 A. That's correct. That's why we did our
9 validation, so we would not see any of those
10 instances.

11 Q. But they do show up naturally; correct?

12 A. At very low level, with increased
13 sensitivity testing, which we do not do at the FBI.

14 Q. Can you please pull up CG-B 62, please.

15 Okay. Ms. Smith, let's try and do it the
16 old-fashioned way. Okay. This is Document 62. So
17 towards the bottom of the page, there is a column
18 called "Run Information," or a heading called "Run
19 Information." Can you explain what total iterations
20 acceptance rate means?

21 A. Total iterations is how many -- so, as part
22 of the STRmix process, it goes through an MCMC, or
23 Monte Carlo Markov Chain process, where it will go
24 through different iterations of the profile. So it
25 will estimate what those different genotypes are.

1 With large -- with multiple people in the
2 mixture -- so, in this instance, four individuals, in
3 order to reach the 400,000 post burn-in acceptance,
4 which what that means is we allow the first 1,000
5 excepts to be thrown out because we know that that's
6 too early in the steps of the process, so the last
7 4,000 would be -- or excuse me, the last 400,000 --
8 would be the ones that are going to generate a more
9 accurate deconvolution of your mixture.

10 The total iterations is how many iterations
11 actually had to be generated in order to reach that
12 400,000 accepts. It's a very complicated process.
13 But what that means is it had to run through 3.4
14 million iterations before it accepted the profile,
15 for a total of 500,000 times.

16 Q. And this is all information that's been put
17 into the program based on the validation studies that
18 you've all done; correct?

19 A. That is not put into the program. The
20 400,000 is set into the program. So the first
21 100,000 of the deconvolution is thrown out. That's
22 part of the validation. The last 400,000 is also
23 from the validation. The total iterations is going
24 to be profile dependent. When you have mixtures of
25 four individuals, that number is going to be higher.

1 When you have lower number of contributors, say, one
2 or two, it's going to be much lower, because it's
3 easier to deconvolute lower number of contributor
4 mixtures.

5 Q. And we don't have that in this case. We
6 have -- what you said in your report is four
7 individuals; correct?

8 A. That is correct.

9 Q. So, let me see if I could break this down
10 into --

11 THE COURT: Let me ask this: Ms.
12 Sirignano, would this be a good time for us to take
13 our lunch break?

14 MS. SIRIGNANO: Yes, Your Honor.

15 THE COURT: All right. We'll be in recess
16 for about an hour.

17 (The Court stood in recess.)

18 THE COURT: All right. Everybody take
19 their seats. Nobody needs to rise. Just go ahead
20 and be seated. Everybody take their seats, and make
21 sure everybody has got a counsel.

22 I should have identified Mr. Walz is here
23 rather than Mr. Winder. Mr. Walz, good afternoon to
24 you.

25 MR. WALZ: Thank you, sir.

1 THE COURT: Mr. Castle, you're here.

2 MR. CASTLE: Yes, Your Honor.

3 THE COURT: Good afternoon to you, Mr.

4 Castle.

5 MR. CASTLE: Good afternoon.

6 THE COURT: Who is on the phone?

7 THE CLERK: I am, Judge.

8 THE COURT: Okay. Anyone else on? Take
9 your mute button off.

10 MS. RODRIGUEZ: Raquel Rodriguez.

11 THE COURT: Anyone else?

12 All right. Ms. Smith, I'll remind you that
13 you're still under oath.

14 Ms. Sirignano, if you wish to continue your
15 cross-examination of Ms. Smith, you may do so at this
16 time.

17 MS. SIRIGNANO: Thank you, Your Honor.

18 THE COURT: Ms. Sirignano.

19 MS. SIRIGNANO: Your Honor, I'd just like
20 to put on the record that about five minutes ago the
21 Government gave to Mr. Adams, who gave to me, this
22 binder, this white binder of the DNA Casework Unit's
23 policies and procedures. And so I'd like to ask that
24 I have the evening to review this, and then recall
25 Ms. Smith tomorrow, if, after my review, there is

1 some cross-examination that I might need to ask her
2 about.

3 THE COURT: How does the Government feel
4 about that?

5 MS. ARMIJO: Maybe, if she finishes her
6 examination today, and takes a break -- I just know
7 that Ms. Smith has flight reservations to leave
8 tonight at 9:00 p.m., and I don't know if she has a
9 conflict tomorrow. We'd indicated to her that she
10 would be on the stand today, and back to work
11 tomorrow. So I'm not sure what she has going on. I
12 can certainly talk to her about it at break.

13 THE COURT: Well, let's see how we go.
14 Maybe you can take a break and see if there is
15 anything in there. I guess my sense is that the
16 policies and procedures don't really impact the
17 Daubert issue. I'm having a hard time seeing how the
18 policies and procedures within the FBI are going to
19 impact a Daubert issue here. She's here to say what
20 she did. And I'm not sure that whether they did or
21 didn't do what they might have in the policies or
22 providers is going to impact that. But --

23 MS. SIRIGNANO: And, Your Honor, I don't
24 agree with you one hundred percent that -- only for
25 the record, Your Honor -- I'm not trying to be

1 argumentative -- we've been asking for these
2 documents for quite some time now. And Ms. Smith
3 testified that this is routine with turning over
4 discovery in her office.

5 And, quite frankly, my position is that,
6 with the statistical results and this STRmix computer
7 program, and the threshold levels, which I talked to
8 the Court a little bit about before, I didn't know
9 what they were. And I still don't know exactly what
10 they all are, because they're contained in that
11 binder that I got just before we resumed.

12 So I understand she has to get home to
13 Virginia, and we're close to the holidays. But I
14 just would like the opportunity to take a look at it
15 before I release her from testifying, Your Honor.

16 THE COURT: Well, let's see if we can --
17 maybe we move to other things here in a little bit,
18 see if you can take a look at it during -- while
19 other people are doing other things.

20 MS. SIRIGNANO: Thank you, Your Honor.

21 THE COURT: Ms. Sirignano.

22 BY MS. SIRIGNANO:

23 Q. Ms. Smith, I think before lunch we were
24 talking about the run information on page CG-B 62.
25 And you were explaining at the time about iterations;

1 correct?

2 A. Correct, yes.

3 Q. Okay. And so you had stated that there
4 were 3.4 million iterations within this STRmix
5 program when the sample was run; correct?

6 A. That's how many iterations were run while
7 the sample was going through the STRmix process, yes.

8 Q. Okay. And you had talked about MCMC, which
9 you said was Monte Carlo Markov Chain; correct?

10 A. Correct.

11 Q. And in layman's terms, that's the algorithm
12 type that the program runs; yes?

13 A. Yes, that is one of them.

14 Q. And it checks the genotype when it runs
15 through the system?

16 A. So you enter a DNA profile into the
17 software; it then deconvolutes the mixture, which
18 means it separates out the different contributors as
19 part of that MCMC process. And then, lastly, it will
20 apply a likelihood ratio to that deconvoluted
21 mixture.

22 Q. And you testified it used models to do
23 that; correct?

24 A. Correct. It uses statistical models, in
25 addition to biological models, which include stutter,

1 degradation, things of those natures.

2 Q. And on page CG-B 065, it shows that there
3 were 500,000 checks, or guesses, the program, before
4 it accepts or rejects a hit, so to speak; correct?

5 A. 500,000 is the amount of the accepts, not
6 the rejects.

7 Q. Accepts.

8 So the computer program -- if I've got this
9 correct -- because I'm not a statistician -- it goes
10 through all of the data that came from all the
11 profiles, from the electropherograms, and it does all
12 these checks or guesses before it accepts an actual
13 type; correct?

14 A. What it's doing is, you enter a profile
15 into the software; the first step is to break that
16 mixture, or that sample up into its different
17 components. What it does is it looks at what DNA
18 types are present in the sample. It then uses a
19 logarithm to guess what it thinks the profile should
20 look like based off of the DNA types that are there.
21 And compares that to the observed profile, what I
22 entered. If it's similar to the observed profile, it
23 will accept that iteration. If it's not similar at
24 all, that guess is not similar to what the actual
25 profile looks like, it will reject that profile, and

1 it will not include that as part of breakdown of the
2 mixture.

3 And so it does this over and over and over
4 again, until it's accepted the profile 500,000 times.

5 Q. And it stops after 500,000 times; correct?

6 A. Correct. And after it stops, it will apply
7 weights to the different deconvolutions, or mixture
8 breakdown, that it observed. And then, from there,
9 it will apply -- or calculate likelihood ratios, if
10 there are known individuals that are also included in
11 your input.

12 Q. Okay.

13 So you talked about weight. So let's go to
14 CG-B 66. You previously testified there were four
15 contributors to this mixed sample; yes?

16 A. Correct.

17 Q. Okay. So on 66 -- this is contributor 1's
18 profile; correct?

19 A. That is correct.

20 Q. Okay. So in the middle column it says
21 weighting, that's the weighting from the algorithm
22 running and doing the checking?

23 A. Correct. That is the percentage of the
24 time it assigned that contributor, each of those
25 different genotypes that are listed there. And the

1 genotype is just the different profile at that
2 location.

3 Q. And so on the left-hand column it says
4 "locus"; correct?

5 A. Correct.

6 Q. And locus is one of those STR locations,
7 those short tandem repeat locations, for instance, D8
8 S 1179 is the name of one of those locations? And
9 those locus appear on an electropherogram; correct?

10 A. Correct.

11 Q. What's an electropherogram?

12 A. An electropherogram is a printout of the
13 DNA profile as it comes off the instrument.

14 Q. Okay. Can we pull up GC-B 59? This is an
15 electropherogram; correct?

16 A. Correct, this is the DNA profile seen on
17 the Phoenix Arms pistol at all of the locations on
18 the screen. It's just some of the locations. But
19 for this sample, the 15 locations plus the sex
20 determining region would have been typed.

21 Q. And you've got nine loci on this
22 electropherogram; correct? And those are the boxes
23 in orange?

24 A. On this page, the page -- this profile goes
25 onto additional pages, but on this specific page

1 there are nine.

2 Q. Okay. And can you pull up 60, please?

3 And these are the remaining loci?

4 A. Yes, that is correct.

5 Q. And on page 61, is this your blank or your
6 control?

7 A. No, it is not. Let me back up just a
8 little. It is, in essence, a form of a control, but
9 it is not what I refer to as a control. A control is
10 when you analyze a sample through the entire process
11 that we know has no DNA in it. This is actually an
12 internal lines size standard. What that means is it
13 is actually is put into the sample, or with every
14 sample, and it helps to estimate what the alleles
15 are, based off their sizes. So this is a known that
16 we put into every sample so that we can determine
17 what the DNA types are.

18 Q. Okay. Let's return to page 59, because
19 we're going to compare page 66 with page 59.

20 So if you could go through this a little
21 bit with me. The loci in the top left-hand corner is
22 the D8 loci; correct?

23 A. That is correct, yes.

24 Q. And moving on to the right, D21, D7, and
25 then CSF; correct?

1 A. Correct.

2 Q. And then going back to page 66, the locus
3 that I just stated appears on the left-hand column,
4 those first four, D8, D21, D7, and CSF; correct?

5 A. Correct. They are listed on this page.

6 Q. Okay. So they correspond; correct?

7 A. Correct, yes.

8 Q. And if you kept going down through page 66
9 and the subsequent pages, it would go through each --
10 21 different loci; correct?

11 A. For contributor 1, and then it would repeat
12 itself for all four contributors.

13 Q. For all four contributors, okay.

14 So I would like to ask, for Contributor 1,
15 on page 66, on the very top it says, Contributor 1,
16 42 percent. So Contributor 1, STRmix determined 42
17 percent of that sample came from Contributor 1;
18 correct?

19 A. Approximately, yes.

20 Q. And then, on page 068, you determined that
21 or STR determined that Contributor 2 was 30 percent
22 of the sample; correct?

23 A. Yes. Again, this is an estimation. But
24 yes.

25 Q. Yes. And these are all estimations;

1 correct?

2 A. Correct.

3 Q. And, in your report, you have determined
4 that Mr. Garcia's DNA is most consistent with
5 Contributor 2; correct?

6 A. That is not listed in my report.

7 Q. I'm sorry, in your worksheet -- did you
8 call it a worksheet? Let me pull up the document.
9 Document 62. Is that correct?

10 THE WITNESS: Your Honor, may I refer to my
11 original page of this, just so I can see the
12 noncopied version?

13 THE COURT: Any objection to that, Ms.
14 Sirignano?

15 MS. SIRIGNANO: No, not at all, Your Honor.

16 THE COURT: You may do so.

17 A. Oh. Yes, I'm sorry, I can determine it
18 here. Yes. So STRmix assigned Mr. Garcia to
19 Contributor 2, that is correct.

20 Q. And you can see that under the summary of
21 contributors, if you go over to the number 2, and you
22 go down to that bottom box, the number 58b(1), that's
23 the item 58, which was the buccal sample from
24 Mr. Garcia; yes?

25 A. Yes. The way this works is it puts

1 Mr. Garcia wherever it gave the highest likelihood
2 ratio. He could be any of those contributors,
3 potentially. It just will provide you with the one
4 that gives the highest likelihood ratio.

5 Q. You have no idea if he could be 1, 2, 3, or
6 4, is that what you're saying?

7 A. When you compare him to a profile, you can
8 see that he cannot visually be excluded. STRmix runs
9 the software against Mr. Garcia and the mixture, and
10 it will give you the one that has the highest
11 likelihood ratio. But that does not mean that it
12 absolutely has to be that contributor. It could be
13 other contributors.

14 Q. So STRmix is saying that the most probable
15 genotype is based on the computer guessing and
16 checking the genotype ratios from the different
17 contributors; correct?

18 A. I wouldn't say it's just guessing. It's
19 using mathematical modeling and statistical modeling,
20 as well as biological modeling, to generate an
21 expected profile based off of the data we're seeing.
22 And then that compares any contributor -- so
23 Mr. Garcia, in this case -- to all four
24 deconvolutions, all four contributors. And it
25 provides the likelihood ratio for the one that gives

1 the highest likelihood ratio or the most support,
2 that is correct.

3 Q. The highest likelihood ratio.

4 A. And in that case, it was 28 for this case.

5 Q. 28 percent.

6 A. Not 28 percent. The likelihood ratio was
7 28.

8 Q. Right, so I'm trying to get from where we
9 are now to 28, so if you could just work with me
10 here. I'm trying to understand this whole system,
11 this whole process here.

12 Now, we're going to look at contributor 2,
13 which STRmix determined was approximately 30 percent
14 of the sample, the total sample, right?

15 A. Yes, that's correct.

16 Q. Okay. And again, this has the locus, the
17 combinations, D8, D21, D7, CSF, like we discussed
18 earlier; correct?

19 A. Correct, yes.

20 Q. And so on page B81, that's Mr. Garcia's
21 profile, correct, from STRmix?

22 A. That was the profile that I entered into
23 STRmix, yes.

24 Q. So at the D8 locus, his allele combination
25 is -- excuse me, his genotype combination is 13, 15;

1 correct?

2 A. Correct.

3 Q. Tell us what that means.

4 A. It means that at the D8 location,
5 Mr. Garcia received a 13 from either his mother or
6 his father and a 15 from the other parent, making his
7 DNA type at that location a 13, 15, which means he
8 has 13 repeats, and 15 repeats of the STR locus.

9 Q. And so each locus going down the left-hand
10 column here, that 21 locus from the kit that you were
11 running, it has -- corresponds with a genotype on the
12 right; correct?

13 A. Yes, that is correct.

14 Q. And those are the numbers that the program
15 uses to identify Mr. Garcia's DNA, the numbers in the
16 genotype; correct?

17 A. This is the last step of the process, so I
18 will input Mr. Garcia's profile into STRmix after the
19 deconvolution is already done. So it doesn't utilize
20 Mr. Garcia's profile until the entire mixture
21 deconvolution is done. It will then compare him to
22 the four contributors to see if there is a match, in
23 essence. And if there is, it will provide a
24 likelihood ratio.

25 Q. Okay. So let's do that. Let's go back to

1 page 68 -- actually, I'm sorry, on the bottom of 68,
2 I believe there was a 69, and at the 13, 15 genotype,
3 which we just established that was Mr. Garcia's
4 genotype, the weighting was 12.544 percent; correct?

5 A. Yes. It would be on the next page, not the
6 page that's on the screen.

7 Q. Okay. And so I don't want to belabor the
8 issue, but if we compare page 81, and then the locus
9 on page 69 -- could you go back to the entire page
10 69 -- Mr. Garcia's profile would be found -- or
11 wouldn't be found in this contributor 2 profile;
12 correct?

13 A. I'm not sure I understand the question.
14 Could you repeat it?

15 Q. I'm sorry, that was a bad question.

16 So looking at page 81, each locus has a
17 corresponding genotype for Mr. Garcia; correct?

18 A. That is correct, yes.

19 Q. So, if we compare page 81, which is on the
20 right-hand side of the screen, with the contributor 2
21 profile coming from page 69, on the left-hand side of
22 the screen, we could do what the STRmix program does,
23 and find each genotype for Mr. Garcia, if it's
24 present in the contributor 2 profile; yes?

25 A. Yes, that is correct. However, I will

1 state that you don't -- depending on the profile, and
2 in this case it was a low-level mixture -- there are
3 some locations where you may not see Mr. Garcia's
4 types. You may see a QQ, which means that STRmix
5 estimated that drop-out could have occurred at that
6 location. So you will not necessarily see his
7 alleles at every single location.

8 Q. And so you find that in the D3 locus, as
9 well as the D2S locus, and the TPOX locus; correct?

10 A. No. D3, his DNA is included in that
11 deconvolution. CSF, I am not seeing his location, or
12 his DNA. So that would be an instance where the QQ
13 under this contributor number would have been applied
14 to Mr. Garcia.

15 Q. And, I'm sorry, you're right. I misspoke.
16 D3 is there. CSF is not there, as well as D2 on the
17 next page, and TPOX; correct?

18 A. I want to go through each one specifically
19 to feel comfortable agreeing to that. But it would
20 not surprise me based on the level of this profile.

21 Q. And you said the level of this profile is
22 low; correct?

23 A. That's correct. And that's consistent with
24 the likelihood ratio that was calculated as well.

25 Q. So just looking at the first locus, D8, the

1 program is saying that 12.54 percent at the 13, 15
2 genotype is Mr. Garcia's. And so 74.76 is not
3 Mr. Garcia's; correct?

4 A. Again, it's not in relation to Mr. Garcia.
5 What the profile is doing is it's saying 12.54
6 percent of the time it saw that contributor and its
7 deconvolution have a 13, 15. Mr. Garcia happens to
8 have a 13, 15, so that weighting would be applied to
9 his likelihood ratio. But, yes, you're correct, the
10 other percentage of the time, 80-something percent of
11 the time it was not consistent with what Mr. Garcia
12 had, that is correct.

13 Q. 74.76 percent; yes?

14 A. Possibly. I'd have to get a calculator.

15 Q. Very good. I'll let you know my math is
16 good.

17 A. I think it actually would be a little
18 higher. Because if it's only 12.4, I think it would
19 be more in the 80s.

20 Q. Okay. I'll take your word for it.

21 So looking at all of these locus, D2,
22 Mr. Garcia's weighted was 9.8 percent; at D7, it was
23 26.03 percent; at CSF, you said that there was the
24 QQ, the drop-out; at D3, the weighting was 9.9947
25 percent. This is Document 69. At TH01 the

1 percentage was 4.9476 percent. And at D13, it was
2 4.48 percent.

3 I'm on page 70 now. At the locus D16, it
4 was 13.70 percent. At D2, there was drop-out. At
5 D19, it was 8.24 percent. And I won't go through the
6 last five locus. But all very, very low percentages;
7 correct?

8 A. That is correct, yes.

9 Q. So that's consistent with the low
10 likelihood ratio; correct?

11 A. Yes. So, typically, when you have a
12 mixture like this where there is a lot of
13 possibilities for the contributors -- and I can tell
14 that just based on looking at the mixture -- it's a
15 low level, four-person mixture, there is a lot of
16 possibilities of who could have contributed to this
17 mixture. And that's reflected on the likelihood
18 ratio that I got. The likelihood ratio typically
19 will range from less than 1. But when it is a
20 positive possible association, or more support that a
21 person is included, it will range from 2 up to over
22 700 billion. So it is a large range. And in this
23 case, the likelihood ratio was 28, which is on the
24 lower end of the spectrum, yes.

25 Q. Very low end of the spectrum?

1 A. Correct, I would agree.

2 Q. When 700 billion is that high, correct, the
3 highest?

4 A. That's correct. And that's why we provide
5 the number. But we also provide a level of support,
6 and we actually list that in our report, so that you
7 can see what the different groupings are that the FBI
8 Lab reports, to not confuse anybody.

9 Q. Okay. So let's talk about your report at
10 B003. I'm just going to talk about item one right
11 now. Is this your report?

12 A. Yes, that is my second report, that is
13 correct.

14 Q. I think the Government introduced this as
15 number 2. And it's dated June 27, 2017?

16 A. Yes, that's correct.

17 Q. This was after you got Mr. Garcia's buccal
18 sample?

19 A. Yes, that's correct.

20 Q. And in your report you stated, "Male and
21 female DNA was obtained from item 3," which is the
22 gun; correct?

23 A. Yes, that is correct.

24 Q. And so how did you draw this conclusion?

25 A. This conclusion was drawn by looking at the

1 sex determining region. It's called amelogenin. If
2 you are a female, you'll be an XX at that location.
3 If you're a male, you will automatically be an XY.
4 So, if you have only male DNA, you expect the X and Y
5 peaks to be of the same or similar heights. If you
6 have a mixture of both male and female, you expect
7 there to be slight discrepancies. So the FBI's
8 policy based off our validation, is that if the ratio
9 is less than 60 percent between X and Y, we'll say
10 that it's a mixture of both male and female.

11 Q. Less than 60 percent?

12 A. Yes.

13 Q. And that would be in your policies;
14 correct?

15 A. That would be mentioned in the policies,
16 yes.

17 Q. I didn't know that.

18 So let's go to B-060. And this is another
19 electropherogram; correct?

20 A. That is the same item, item 3. That's the
21 one we previously looked at.

22 Q. Well, we looked at the D8 locus initially
23 on page 59, and now we're on page 60, which starts
24 with the D19 locus; correct?

25 A. Correct. It is the same profile; it's just

1 the second page of the profile. That's correct.

2 Q. Thank you. So at the bottom of the page,
3 on the left-hand side, there is a green bar, and you
4 stated that this was amelogenin locus?

5 A. Amelogenin, yes.

6 Q. Okay. So this, you stated, discusses the
7 proportions of the X and Y chromosomes; yes?

8 A. Correct. In here, you can see that the X
9 and Y are very similar, so the majority of this
10 profile mostly contains male DNA; however, based off
11 the ratio, it was less than 60 percent, so therefore,
12 I called it a mixture of both male and female.

13 Q. Okay. So let's do the work behind this
14 data here. So the X box refers to what?

15 A. The X box is the X allele or the X DNA
16 type, and that's found in both men and women.
17 Females have two copies of it. They receive one from
18 mom, one from dad. Males always will receive a Y
19 from their dad; so the X comes from the mother, so
20 they have one X one Y. So those are just the DNA
21 types that are possible at the amelogenin locus.

22 Q. So at 855, which is in the X box, RFU, or
23 relative fluorescent units, there was 106.26;
24 correct?

25 A. That is not correct. So 106.26 is the size

1 of that allele. 855 is how much of it was present.
2 So that's the RFU value. So 106.26 and 855 are
3 really unrelated with one another. They're just both
4 aspects of that X allele.

5 Q. Of the X allele. Okay, thank you.

6 And then, in the Y, there was 495 RFU
7 present; correct?

8 A. That is correct.

9 Q. So we're talking about the DNA molecules in
10 this particular allele; correct?

11 A. That does not reflect how many DNA, or how
12 much DNA necessarily was present. It's not
13 correlated specifically to how many molecules are
14 there. What it's doing is, the more DNA you have in
15 the system, the more fluorescence that DNA gives off
16 when it runs through the instrument. And the reason
17 why it does that is that all the DNA is labeled with
18 fluorescent tags, so that when it passes the camera,
19 it will pick up on how much DNA is present. So the
20 more DNA present, the higher those numbers are. But
21 it does not correspond to exactly how many molecules
22 are present.

23 Q. Thank you for clarifying that.

24 So based on this XY combination, and that
25 the Y at 495 RFUs is shorter than 60 percent, that's

1 an indication that both men and women contributed to
2 the sample?

3 A. Yes. It appears based off of the ratio
4 that there is mostly male DNA there; however, it does
5 appear that the X is slightly higher. And if it is
6 less than 60 percent, then we would state in our
7 report that it's a mixture of both male and female,
8 have at some point come in contact with that item.

9 Q. Do you know what the percentage is?

10 A. I don't recall off the top of my head
11 without a calculator. I believe it was in the 50s,
12 but I can't recall exactly.

13 Q. Okay. So let's go to CG-A 113. And this
14 was part of the -- your notes for items 3 and 4;
15 correct?

16 A. Yes, that's correct.

17 Q. And we know that to be true based on the
18 left-hand side of the page, the column that says
19 exhibit number?

20 A. That is correct, yes.

21 Q. And the quantification test that you do
22 determines if there is enough DNA for the actual
23 process; yes?

24 A. It allows us to see how much DNA is
25 estimated to be in that sample. Because we do want

1 to target a specific amount of DNA. We want to
2 target approximately one nanogram of DNA to get the
3 best results. And with low level samples like these,
4 we were not able to target that full amount.

5 Q. So you did not have one nanogram of DNA in
6 either one of these samples; correct?

7 A. That is correct. We did not have a total
8 of one nanogram when we did our processing. We know
9 that we can process lower than that. It's just based
10 off our validation, we aim for one nanogram because
11 then we know we're going to see the most information
12 based off the validation.

13 Q. So you did two tests here, the duo human
14 test and the duo male test; yes?

15 A. It is one test, but it looks at both the
16 amount of human DNA and also male. The reason why we
17 do this is because on some cases this will allow us
18 to determine if we should use a different STR typing
19 kit that looks at male DNA only.

20 Q. And looking at Exhibit 3, the human DNA
21 that was detected, the quantities, and nanogram per
22 microliter was 0.0448; correct?

23 A. Not percent.

24 Q. Excuse me. Go ahead.

25 A. It's 0.0448 nanograms per microliter.

1 Q. And then for a male, it was 0.0432
2 nanograms per microliter; yes?

3 A. Yes. But these, again, are estimations but
4 yet it is.

5 Q. Yes. So they're all approximations in your
6 whole report or your bench notes and your summary
7 sheet; correct?

8 A. It is an estimation based off of how the
9 PCR process works, yes.

10 Q. So, in terms of percentages, the PCR
11 process found approximately 4 percent female DNA and
12 96 percent male DNA; yes, based on the quantities of
13 nanograms per microliter?

14 A. I would have to get a calculator to
15 determine that. But, again, these are estimates, so
16 I wouldn't say that that's an exact representation.

17 Q. Well, I'm just doing the math: 0.0448 to
18 turn it into a percentage. And does that sound
19 unusual that only 4 percent would be female DNA?

20 A. Not necessarily, no. Like I said, looking
21 at the profile, the majority of it does appear to be
22 male, the X and the Y chromosome proportions were
23 very similar. So, no, that wouldn't necessarily
24 surprise me.

25 I just don't want to agree on specific

1 numbers without a calculator present.

2 Q. Fair enough.

3 So turning back to the electropherogram on
4 B60. How do you reconcile this electropherogram with
5 the quantitative notes that we just looked at?

6 A. It's very common with low-level samples
7 like this, because it is low amount of DNA. The
8 process is not exact, it is an estimation. So you
9 can have slight differences between what you're
10 seeing at amelogenin, and what you're seeing in your
11 quantification notes. So I'm not surprised to see
12 that.

13 Q. The differences?

14 A. Yes. So the quantification notes looked
15 more similar in the amount of human and male. But
16 again, at low-level samples it is extremely important
17 to remember that it is an estimation. Same thing
18 with the amplification here. This is a four-person
19 low-level mixture. So, again, you're going to see an
20 estimation of what is in that sample.

21 Q. So how do you calculate the degree of
22 imbalance on this electropherogram in terms of women
23 or men at this locus?

24 A. I can't without knowing exactly who is in
25 the sample. It could be one female to three males,

1 potentially. It could be very little DNA. It could
2 be individuals that have slight mutations at their
3 amelogenin types, make their Y chromosomes slightly
4 shorter. So it could be four males. There is
5 possibilities that I can't speak to specifically
6 without knowing exactly what the makeup of the sample
7 is. And we never can tell that makeup.

8 Q. Never know; correct?

9 A. That's correct. We don't know how this DNA
10 or when it got deposited on this item.

11 Q. So you drew the conclusion that male and
12 female DNA was obtained from item 3, but you have no
13 idea. It could have been four females; correct?

14 A. No, I would not expect that, no.

15 Q. But you just said that it could be more
16 than one woman; correct?

17 A. It's possible. What it looks like is it
18 looks like mostly male DNA, with some slight
19 contribution from a female. I can't say for certain
20 what that makeup is, because I do not know whose DNA
21 is on this item. So I cannot say for certain.

22 Q. But the total of the XY contribution, it
23 could be more than 4 percent from the qualitative
24 results that you received during the actual process
25 of processing the DNA; correct?

1 A. Yes, that is correct. And that's again
2 because they are low-level samples. We know that --
3 the reason we target one nanogram from each
4 individual is because you know you're going to see a
5 complete picture of DNA. With less than one
6 nanogram, we know that we're not getting all of the
7 information. So you're going to see slight
8 discrepancies between the quantification and the
9 profile, because, again, these are estimates.

10 Q. And that would be in your SOPs, right, that
11 you require -- or you prefer, at least, one nanogram
12 of DNA to run through the PCR process, yes?

13 A. That would mostly be in our amplification
14 procedure, yes.

15 Q. But you had significantly less with this
16 sample; correct?

17 A. I would say we had quite a bit less, yes.

18 Q. Okay. Let's go to CG-B. 65, please.

19 Now, we already talked about the parameters
20 and how the FBI has set, and based on their
21 validation they've locked in a zero value for their
22 drop-in cap, drop-in frequency, and drop-in
23 parameters; yes?

24 A. Yes, that is correct.

25 Q. Now, if you do have drop-in or drop-out,

1 how do you know?

2 A. I would not expect to have drop-in because
3 we did not see it in our validation. And we ran
4 thousands upon thousands of samples through our
5 validation.

6 Q. But it naturally occurs; yes?

7 A. There is DNA in the environment, that is
8 true. However, through the amplification process,
9 how you amplify your samples, how many cycles you
10 use, things like that, that is when you're going to
11 see drop-in. Each lab is different. They may have
12 more sensitive instruments than others. So,
13 therefore, our validation was done to ensure we saw
14 no drop-in. And we did not in our samples. We made
15 sure to set our thresholds above that drop-in value.
16 And that would be through our validation.

17 Q. And contamination would be part of that;
18 correct?

19 A. The drop-in and contamination are two
20 separate incidents. Contamination is when a
21 biologist may show up on an item, or if two items are
22 touching one another, then they could show up on an
23 item. But in this case each item was processed
24 separately. And, again, I did not see any instances
25 of contamination.

1 Q. But it occurs -- maybe not in this sample,
2 but it occurs generally in all kinds of laboratories;
3 true?

4 A. I would say it can happen. It's not a
5 common occurrence. There is quality measures in
6 place to prevent it. And then, if contamination is
7 identified, the samples are reprocessed.

8 Q. I just am having difficulty understanding,
9 with zero parameters, how you can really reconcile
10 drop-in or contamination. And I understand that
11 you're saying that it was validated. But it happens.
12 And so with a zero parameter, you've got no leeway
13 for any of these natural events to happen; yes?

14 A. Correct. What it does is it will -- STRmix
15 will not model drop-in. And the reason it's not
16 modeling it, is because we did a very extensive
17 validation, which is also published in peer review
18 articles that discusses what we did in our
19 validation. And it was determined that we saw no
20 drop-in at the parameters we were using. So,
21 therefore, we do not expect to see it. And even if
22 it did occur in this case, which there is no evidence
23 of, and I would not expect, it wouldn't have a real
24 effect, because of the fact that it is a four-person
25 low-level mixture. To see one additional peak show

1 up would not exclude anybody specifically.

2 Q. Okay. So I just want to talk a little bit
3 about this validation. The peer review articles that
4 you referred to in your internal validations on
5 STRmix were done on Version 2.3; yes?

6 A. Yes, it was done on the original version, a
7 paper was written on the original 2.3. But, however,
8 every time we up to a new version, we do another
9 validation of that software. But the peer review
10 article is not specifically to each version.

11 Q. Correct. So the version that y'all used,
12 or that you used on this sample was the new version
13 2.4.05; correct?

14 A. Yes. And it's just -- there is some
15 modifications to this newer version, allows us to
16 accommodate GlobalFiler, which is the newer kit.
17 However, again, a full validation was done. But the
18 background information of how the validation was
19 accomplished is in the peer review paper. They are
20 very similar.

21 Q. But they are also different, because it's a
22 different version; yes?

23 A. Slight differences. It's kind of like when
24 you have Windows 8 goes to Windows 9. There are
25 differences, but the main format is the same.

1 Q. We're looking at B 062, up on the left-hand
2 corner, it says which version you used; correct?

3 A. That is correct, yes.

4 Q. Version 2.4.05. So there is no peer review
5 articles or no published papers regarding this
6 version?

7 A. We don't have a peer review publication for
8 this specific version. However, the validation is on
9 STRmix, in general, and the use of STRmix. The
10 things that have changed were revalidated, and those
11 are going to be reviewed by peers during audits and
12 accreditation.

13 Q. What's been changed?

14 A. For instance, the layout is changed
15 slightly. So the calculations are similar, but the
16 layout of the report is more user friendly. There
17 are slight modification this allows us now -- we
18 validate at 2.4.05, for using GlobalFiler, which is
19 an updated kit.

20 So we did a very extensive validation on
21 this version. However, we could not publish it
22 because we have already put a publication out, and
23 most publications don't want same publication
24 multiple times.

25 Q. And the validation summary, is that part of

1 the documents that I was given, the SOPs and the
2 manuals and the protocols, or not?

3 A. No.

4 Q. Are these validation studies public?

5 A. The validation report is public. The
6 STRmix validation is on many, many, many CDs. So it
7 does exist, but we typically do not provide that on
8 discovery.

9 Q. Is that something that we could get, when
10 you get back to your office and provide it?

11 A. That would have to go through our legal
12 department. We don't typically provide that, no.

13 Q. Well, I'll ask your legal department then.

14 A. I will say that the validation paper is
15 public, which you can access.

16 Q. But it's of a different version; correct?

17 A. Correct. But the validation is the same
18 between the two.

19 Q. But the versions are different; correct?

20 A. That is correct, yes.

21 Q. Okay. So let's look at CG-A 140. This is
22 a different electropherogram from what we've been
23 looking at; yes?

24 A. Yes, this is a positive control.

25 Q. Positive control. And this is a single

1 source profile; yes?

2 A. That is correct.

3 Q. And looking at the bottom right-hand corner
4 of the D18 locus there is a peak there, an allele
5 peak, and underneath it there is a box that says
6 "Spike, 279.75," and then 54, that's RFUs; correct?

7 A. That's correct.

8 Q. That's the height of the peak, the 54 RFUs?

9 A. Yes, that's correct.

10 Q. Okay. So what's the FBI threshold for peak
11 height in all electropherograms?

12 A. Fifty.

13 Q. Fifty. And --

14 A. At this time. Excuse me. It has changed.

15 Q. It has changed?

16 A. With the GlobalFiler, we now have a
17 different threshold. But with Identifiler, the
18 Identifiler threshold is 50.

19 Q. So in this electropherogram, which was done
20 at the same time that items 3 and 4 were done, the
21 threshold was 50 RFUs?

22 A. That is correct, yes.

23 Q. And what is it for GlobalFiler now?

24 A. The threshold is 150. And then the
25 drop-out threshold is 725. And that's because we're

1 using different instruments that are more sensitive,
2 and they actually -- the numbers are much higher in
3 those instruments.

4 Q. And that would be probably another change
5 in the version of the software that you're using
6 based on this GlobalFiler kit that you're using?

7 A. The software itself is the same. The kits
8 we're running is more about allele frequencies. So
9 how common the different types are seen at the
10 different locations. And there are some changes made
11 to the software to accommodate the different kits,
12 that is correct.

13 Q. Because there would be more locations that
14 you're looking at from 15 to 21 loci; correct?

15 A. Correct. But that again, is not the STRmix
16 itself. The validation has to be done on the kit
17 itself, so that we can enter those values into
18 STRmix. So, for instance, you're going to see
19 slightly different stutter ratios between the
20 GlobalFiler and the Identifiler, just due to how the
21 kits behave.

22 For this case it's really only relevant
23 with Identifiler, because the known reference sample
24 is the only sample that was run with GlobalFiler.
25 And that was not deconvoluted using STRmix.

1 Q. Let's just go a little slower because
2 Ms. Bean's hands aren't keeping up with us.

3 So the different thresholds for the peak
4 heights, for the stutter ratios, for the drop-out
5 thresholds, those are all in the white binder that I
6 just received after lunch; correct?

7 A. No, those would be based off our
8 validation. Those binders are specifically our
9 protocols on how to interpret data, how to run the
10 data through collection, extraction. And those are
11 not procedures. Those are thresholds that we enter
12 into STRmix through validation.

13 Q. And you just said that the validation
14 studies or reports are only public for the newer
15 version -- or the older version; correct?

16 A. The older version which would have those
17 same ratios. The old version that's published is
18 based off of Identifiler, which is relevant to this
19 case. So although the version number changes, the
20 stutter ratios, the variances, all of that would be
21 the same as validation, which is published.

22 Q. So I'm assuming, based on all this data,
23 that the FBI continues to change and upgrade their
24 kits and the software, and the DNA process using
25 STRmix; correct?

1 A. The STR process is the same. We look at
2 different kits when necessary. We want to maintain
3 the kit that we have. So we have GlobalFiler now.
4 We're going to continue using GlobalFiler, and until
5 a new kit comes out that the FBI deems is worthy of
6 validating.

7 It really depends on the scenario. We do
8 stay up to date. With the STRmix software there are
9 new versions all the time. It depends on what those
10 changes are, whether or not we will do a new
11 validation on the new software. We just won't
12 implement those version changes if they're irrelevant
13 to our analysis.

14 Q. And so how does the FBI reconcile a
15 previous version with a better version and the
16 results from a previous version? It would seem
17 inconsistent to me, that work that was done
18 previously on an older version is not as accurate as
19 the newer version?

20 A. I disagree with that completely. The two
21 versions would be -- before we switch to a new
22 version, we'd actually do a side-by-side comparison
23 to ensure we're getting the same results using both
24 versions. So you're not going to get a different
25 answer with the newer version. The newer version

1 just has more features. It allows us to use
2 GlobalFiler. That's not because of the STRmix
3 software. That's because we validated GlobalFiler
4 using the newer version. The software always could
5 handle it. We just hadn't validated it yet.

6 Q. So what I'm hearing is that this is all
7 done within the FBI, and all validated by the FBI.
8 Has any outside entity or any peer review article
9 been done or any study been done between the older
10 versions and the newer versions that would make it
11 generally accepted in the scientific community?

12 A. STRmix, in general, has already been
13 accepted in Daubert challenges for -- at the state
14 level. There are many, many papers out about STRmix.
15 And they may discuss the different versions. I don't
16 know specifically of a paper that talks about the
17 comparison between the two. I'm sure ESR, which is
18 the developer of it, has a paper out there. They
19 have hundreds of papers out there on all their
20 different mathematical models for their testing. So
21 I'm pretty sure there probably is. But I just don't
22 know it off the top of my head.

23 Q. Okay. But you didn't really answer my
24 question. Do you know if there is a paper or
25 something that's been peer reviewed, generally

1 accepted in the scientific community, that has done a
2 comparison, other than the FBI's validation, between
3 these two versions of STRmix?

4 A. Again, STRmix itself is --

5 Q. I'm sorry. I'd like to ask you to answer
6 the question, please.

7 A. I don't know the specific paper that
8 compares the two. However, STRmix has been
9 extensively peer reviewed.

10 Q. The previous version, not the one that
11 we're talking about?

12 A. Again, I disagree with that, because STRmix
13 itself has been developmentally validated, but would
14 use multiple version. They run tests before they use
15 multiple versions. They run tests before they
16 release the versions. And before a lab can utilize
17 them, they have to go through a validation process.
18 So there may not be a paper that specifically
19 addresses the different versions. But STRmix, in
20 general, has gone through this extensive peer review
21 publication. The versions are minor changes between
22 the different ones. Again, just the same as
23 Microsoft Office 8 will be slightly different than
24 Microsoft Office 9, but the backbone is still the
25 same.

1 Q. Let's talk about Microsoft 7 versus 10.
2 They're extremely different; correct?

3 A. It's possible. Again, I can't speak to the
4 specific changes that ESR made. I can tell you that
5 our validation did those studies and showed them to
6 be providing the exact same results. So, therefore,
7 I'm completely confident using different versions of
8 the software.

9 Q. But you can't say with any certainty that
10 this new version, other than the FBI's own study, has
11 been generally accepted in the community; correct?
12 I'm not talking about the program, I'm talking about
13 the version.

14 A. Well, ESR has been using it for forensic
15 casework since the beginning. So I do know that
16 there are other labs that are doing this, yes.

17 Q. ESR, meaning proprietary software
18 developer; yes?

19 A. They are the developer, but they're also a
20 forensic laboratory that does caseworking analysis.
21 So they have been using it in Australia and also New
22 Zealand. And again, there are 30 or so, at least,
23 different labs in the country using it. So they
24 would also have to validate each software. They may
25 not be published about the differences between those

1 two specifically; however, again, every lab that uses
2 the different softwares must validate them prior to
3 their use. So it's not just the FBI.

4 Q. Okay. Thank you.

5 Let's go back to CG-A 140. I'm sorry, I
6 went off on a little tangent there.

7 And we were talking about the D18 locus
8 there and the box with the 54 RFU peak, which you
9 said was above the 50 RFU threshold. And there has
10 been a red line, diagonal red line, put through this
11 box; correct?

12 A. That is correct, because it is not a DNA
13 peak. That's why it was crossed out.

14 Q. Well, what is it?

15 A. It's a spike which is an artifact. It's
16 pull-up from the camera. The camera cannot visualize
17 that separation well. So it's labeled as a spike by
18 the software, and it is excluded, and I reviewed it,
19 agreed, and then my technical reviewer also agreed.

20 Q. And you put the line manually through this
21 spike; correct?

22 A. I did. However, the software labeled it as
23 a spike.

24 Q. Well, you don't really know if that's a
25 real DNA molecule or not, or a real peak for a real

1 DNA molecule or not, do you?

2 A. I do based off my training and experience.
3 I can visualize the differences. They have a
4 different morphology, meaning spikes are generally
5 thinner. They typically fall right below a peak in
6 another color, which in this case it did. This is a
7 known artifact.

8 Q. And contamination could be a spike, too;
9 correct?

10 A. Contamination would not be a spike, no. It
11 would be a peak that falls within a bin that is
12 labeled as an allele. And this is not what this is.

13 Q. And let's go to CG-A 201. This is another
14 electropherogram; correct?

15 A. Yes, that is correct.

16 Q. And it came from item 22; yes? At the top
17 on the left-hand corner?

18 A. Yes. And item 22 is a swab from a stain at
19 04 Aaron Court. It's a different submission.

20 Q. And just for example, by way of example,
21 looking down at the D19 locus on the bottom left-hand
22 corner of the electropherogram, the 17 allele has
23 also been stricken at 56 RFUs; correct?

24 A. That is correct. And on the next page of
25 my electropherogram there is a zoom-in of that

1 location. And it does not have the correct
2 morphology of a peak. So, therefore, it was struck
3 through.

4 Q. What do you mean by doesn't have the
5 correct morphology of a peak?

6 A. As you can see, the peaks in this diagram
7 are thin, tall peaks. The 17, if you zoomed in on
8 that, which I do have a zoom of, that was provided in
9 my case file, it's a flat, wide peak. So it's
10 consistent again with bleed-through, which is another
11 artifact in the process.

12 Q. What's bleed-through?

13 A. Bleed-through, again, is when the camera
14 cannot distinguish the colors. It's kind of similar
15 to when a child slightly colors outside lines. It's
16 not really picking up just in that one color channel.

17 Q. What else could that be other than
18 bleed-through?

19 A. I don't think it's anything else besides
20 bleed-through, based off of the zoom-in off the peak,
21 which you cannot see in this electropherogram
22 printout.

23 Q. Let's go to B 59, please.

24 Okay. And we're back to item 3, this
25 electropherogram. And at the D21 locus, you kept the

1 59 RFU peak; correct?

2 A. I'm sorry. Can you repeat which locus, so
3 I can see specifically what you're referring to.

4 Q. Oh, sure. D21.

5 A. Yes, I did.

6 Q. Okay. So how do you reconcile that this
7 was at 59 RFUs, and the two samples we saw before
8 were in that 50 to 60 range, and you kept this peak?

9 A. Again, it's comparing apples to oranges.
10 The 32.2 here looks like a peak. It has the correct
11 shape. It has the correct morphology. It's falling
12 into a bin and being called by the software. The
13 other two peaks that you showed previously, although
14 they are above 50, they do not have the correct shape
15 or morphology, so therefore, they were crossed out.
16 That is part of my job as a forensic examiner to
17 interpret every allele that I'm seeing to determine
18 if whether it is a true peak or a potential artifact
19 prior to running it through any software.

20 Q. And would your standards for interpretation
21 be in this binder of policies and procedures, or is
22 this something you learned elsewhere?

23 A. The basic information will be in the
24 policies. It will mostly just state what a spike is,
25 what bleed-through potentially is, what stutter is.

1 It will not go into detail. That mostly was during
2 my training.

3 Q. But you'd agree that a 50 to 60 RFU range
4 in a low sample, low-level sample, is difficult to
5 assess if there are DNA molecules or not; correct?

6 A. Again, I don't agree that. The validation
7 that was done on Identifiler showed that anything
8 above 50 would be considered a true peak, versus
9 background noise, unless it has the incorrect
10 morphology, which those are easily distinguished. So
11 a spike is easy to tell that it is not a real DNA
12 type based off of the shape of the peak. Also
13 bleed-through is the same way; it's easy to
14 distinguish, versus a real peak.

15 Q. So you're calling it a spike morphology and
16 the artifact morphology -- the morphology for an
17 artifact or a spike is different than an actual
18 allele; correct?

19 A. Correct, yes.

20 Q. And so how do you determine if there is
21 drop-in or contamination in these peaks?

22 A. Contamination if there is a profile that I
23 can compare to my staff -- we have a staff database
24 that I will compare certain profiles to. I will be
25 able to see it in blanks. We run negative controls

1 and blank samples through the process. A blank has
2 no DNA in the sample. So when I run that through the
3 process, if I see any DNA in that sample, or in the
4 negative control, I know that I have contamination.
5 And that did not occur in this case.

6 Q. Okay. Let's turn to number of contributors
7 to a mixture. And you said that there were four in
8 your report at CG-B 003; yes?

9 A. Yes.

10 Q. And you said the interpretation of item 3
11 was performed assuming that the DNA originated from
12 four individuals; correct?

13 A. Yes, that's correct.

14 Q. And that's four and only four; yes?

15 A. My interpretation was a four. We never
16 know exactly how much people are on a sample.
17 However, through my training and experience, I
18 determined it was four individuals.

19 Q. So four and only four?

20 A. My interpretation was run at four. I do
21 not know specifically. There could be more -- or
22 there would not be less -- there could be more, but
23 however, based on what I saw, I interpreted that that
24 is four.

25 Q. It could be three or more; correct?

1 A. Again, I'd have to look at the profile. I
2 saw no evidence of three. I saw four individuals
3 during my interpretation.

4 Q. And you used the maximum allele count to
5 come to that determination?

6 A. One of those -- that's one method. I also
7 used peak heights between different alleles. So, for
8 instance, if the two peaks are present, and they came
9 from one person, they should be of similar heights.
10 If there is a big discrepancy between them, I know
11 that that has to be two people, so I would use that
12 information in addition to the maximum allele count,
13 which is just counting up the number of alleles I see
14 and dividing it by two.

15 Q. Let's do that. At CG-B 59, and at locus
16 D13 there are seven alleles present there; correct?

17 A. Yes, that is correct. So it has to be at
18 least four individuals. And based off the peak
19 heights and the rest of the profile, I determined it
20 was four.

21 Q. And did you use this locus D13, these peak
22 heights to make that determination?

23 A. That was one of them, yes.

24 Q. And which other ones did you use?

25 A. I would use the whole profile. I look at

1 the entire profile. I'll look at each location. D13
2 had seven alleles, so I knew it had to be four. If
3 there was more than four, I would say it's five
4 individuals. However, in this case, that's not what
5 I saw.

6 Q. But it could be three or more, yes?

7 A. Based off of D13, I do not believe it could
8 be three or more.

9 Q. Okay. So what you said earlier was any
10 human can contribute up to two alleles; correct?

11 A. Correct.

12 Q. So if you have seven alleles divided by
13 two, it's 3.5; correct?

14 A. Correct. So that has to be four people,
15 because you can't have half an allele.

16 Q. So, technically, your conclusion should be
17 at least four; correct?

18 A. No. So STRmix, you must determine the
19 number of contributors. So when I look at the
20 profile as a whole, I will estimate the number of
21 contributors, which in this case I did four. I then
22 run it through the software at four. I will look to
23 see the output, if there are any issues with that
24 deconvolution. In this case, I did not see any.
25 Therefore, I reported it as four, based off my

1 training and experience.

2 Q. Correct. But just to be clear, STRmix, if
3 you put in four, it's going to generate data for four
4 individuals; yes?

5 A. It will, yes. But if it doesn't agree with
6 that, sometimes you will see red flags when you're
7 reviewing the output. You'll see issues with the
8 deconvolution don't make sense. And in that case, I
9 didn't do that.

10 Q. But the program doesn't come back and say,
11 Hey, this should be three, does it, or this should be
12 five, does it?

13 A. No, it does not. And that, again, is the
14 human intervention aspect. The human intervention
15 is -- we've been doing number of contributors for a
16 very long time, and that's based off my training and
17 experience, I came to four.

18 Q. And the data set could be completely wrong
19 if you chose four, and it should have been three or
20 five; correct?

21 A. It wouldn't be completely wrong. We did
22 our validation, and we actually tested that so
23 through our validation we actually increased the
24 number by one, and we also decreased the number by
25 one, to see what would happen if you are incorrect in

1 your assumption. And we saw the effect was
2 negligible. The reason we do this is we do not know
3 how many contributors are ever present, because we
4 were not there to see what DNA was left on an item.
5 We can only use what we're seeing in the profile, and
6 do the number based off of our training and
7 experience.

8 Q. Right. So like you just said, you don't
9 know exactly how many numbers of contributors there
10 are on a profile, especially when there is a mixed
11 sample like this; correct?

12 A. Correct. We never know. We make the best
13 estimate we can based off of what we're seeing.

14 Q. And that's all it is, is a best estimate,
15 it's a guess; correct?

16 A. It is an estimation. That's why we include
17 those limitations in our reports.

18 Q. And it's a subjective determination here;
19 that's why I was saying that your report should say
20 at least four, instead of four?

21 A. The interpretation using STRmix, that
22 likelihood ratio was developed based on four. That
23 is why it is listed as four in my report. And it was
24 also technically reviewed by another qualified
25 examiner, who also agreed that it was four.

1 Q. Correct. But you're putting the data into
2 STRmix, and STRmix is generating the profiles based
3 on the number of individuals you put into the system;
4 yes?

5 A. It is generating profiles, yes. But you,
6 as an examiner, have to assess that profile first.
7 The same thing with my technical reviewer would
8 assess that profile first, before looking at the
9 STRmix, and before running STRmix. Therefore, my
10 technical reviewer and myself both agreed that it was
11 four prior to running STRmix.

12 Q. And what publications have you done or the
13 FBI has done on the uncertainty in determining the
14 number of individuals in a mixture?

15 A. There is never any certainty, unless you
16 make up the mixture yourself. So there are no
17 publication based off of the certainty of the number.
18 Through our validation, we discuss what would happen
19 if you guessed the number wrong. So if you put in
20 four, and it was really five, or you put in four, and
21 it was really three, the validation covers those
22 scenarios.

23 Q. Right. And so the data would be incorrect,
24 if you put the wrong number in; yes?

25 A. The number of contributors would. The

1 deconvolution showed that the -- in most instances,
2 the deconvolution were similar. The only issue we
3 saw was that low-level contributors would tend to get
4 split out to two, instead of one, which would be
5 incorrect. However, it also lets you false
6 exclusions.

7 Q. And that's what we have here is a low-level
8 contributor; true?

9 A. The whole profile is low level.

10 Q. Right. So this is my point: Specifically,
11 is that the false, unknown individuals, false
12 contributors, with low-level samples like this, there
13 is significant uncertainty in this process; correct?

14 A. Again, I don't agree with that. I'm using
15 my education and training to estimate the number of
16 contributors, which I did here. I then analyzed the
17 output from STRmix, and I saw no discrepancies. And
18 then my technical reviewer both independently
19 interpreted the profile, and then also ran or --
20 reviewed my STRmix output, and again agreed with me.
21 So I do not believe there is issues.

22 Q. Are you familiar with NIST?

23 A. I am, yes.

24 Q. The National Institute of Standards and
25 Technology?

1 A. Yes, I am.

2 Q. Are you familiar with their 2015 study, the
3 Coble paper, regarding the uncertainty in the number
4 of contributors in the new CODIS process?

5 A. I have not read specifically that paper,
6 but I've heard of that paper.

7 Q. What have you heard about it?

8 A. Just that they did a study using multiple
9 laboratories. But that's all I know about the paper.

10 Q. Multiple laboratories with multiple
11 contributors for samples; correct?

12 A. Yes. Again, that's based off of an
13 individual's training and experience. I can't speak
14 to specifically what they found in their study, and I
15 can't speak to what they did in their study, because
16 I have not read that paper.

17 Q. Have you or the FBI done a study on the
18 number of contributors in the mixture?

19 A. Part of our validation, we ran samples of
20 known number of contributors through the software.
21 And we also analyzed what the number looked like
22 after it was amplified. So we did do studies on it
23 as part of our validation, but that would not
24 specifically be published. That would -- parts of
25 that would be published in the internal validation

1 paper. But we did additional studies as well.

2 Q. For the old software program; correct?

3 A. For the software program that specifically
4 speaks to Identifiler. We also did it with the new
5 software as well.

6 Q. But nothing public in terms of uncertainty
7 with number of contributors in the STR program within
8 the FBI; yes?

9 A. Again, I disagree with that. We don't have
10 a paper specifically labeled that. However, the
11 validation paper is published, and it does talk about
12 what happens when you run STRmix with incorrect
13 number of contributors, which addresses your
14 question.

15 Q. So you referred to this validation paper
16 quite a number of times here. So was that the paper
17 you're saying that I need to get from your legal
18 department?

19 A. No, that paper is readily available on the
20 internet.

21 Q. But the one on the newer software, I'd need
22 to get from the legal department; correct?

23 A. The validation studies, all the paperwork,
24 that is part of our -- that is in our laboratory. We
25 don't typically hand over our validation on discovery

1 requests. But our legal could potentially assist you
2 with that. I just know we don't normally hand that
3 over.

4 Q. Right. But referred to a number of times
5 today; yes?

6 A. Our validation is the key aspect of our
7 testing. We will not bring anything online until
8 it's been validated, both developmentally by the
9 manufacturer, and then also internally. So it is
10 extremely important, yes.

11 Q. Has the FBI studied drop-out or possibility
12 of contamination with multiple individuals in a
13 mixture?

14 A. We looked at drop-out as part of our
15 validation, again. Contamination wouldn't be
16 specifically addressed in that study. However, it
17 would refer to the fact that we did not see drop-in.

18 MS. SIRIGNANO: One second, please.

19 THE COURT: Certainly.

20 Q. Okay. Let's go to the likelihood ratio.
21 Finally, CG-B 003, that's your report. And you had
22 two hypotheses here, and then you determined your
23 likelihood ratio; yes?

24 A. That's correct, yes.

25 Q. The first hypothesis you assumed that the

1 DNA originated from four individuals; yes?

2 A. That would have been both hypothesis would
3 assume four. Who those individuals are would be the
4 differences. But yes.

5 Q. Okay. And the second hypothesis, I guess
6 what I saw was that Mr. Garcia, and there were three
7 unknowns, to equal four; yes?

8 A. Yes. So one hypotheses was Mr. Garcia and
9 three unrelated unknown individuals. The other
10 hypothesis was four unrelated, unknown individuals,
11 which did not include Garcia.

12 Q. Okay. So -- and this report you did on
13 June 27, 2017; yes?

14 A. That is correct, yes.

15 Q. And so the likelihood ratio you determined
16 in your report was the DNA typing results. And there
17 is a footnote there, little 2, for item 3, are at
18 least 28 times more likely if they originated from
19 Garcia and three unrelated, unknown individuals, than
20 if they originated from four unrelated unknown
21 individuals; correct?

22 A. Yes, that's correct.

23 Q. And the calculations in your footnote were
24 performed using African American, Caucasian,
25 Southeastern Hispanic, and Southwestern Hispanic

1 populations; correct?

2 A. Yes, that's correct.

3 Q. And the likelihood ratio -- can we go to
4 the next page, please, CG-B 004, please. That's on
5 the next page; right?

6 A. Yes, that is the table that we provide to
7 help explain where those likelihood ratios fall.

8 Q. So we've got 28 here; correct?

9 A. That is correct.

10 Q. And that would fall within the likelihood
11 ratio of 10 to 99. And the qualitative equivalent or
12 the verbal equivalent that the FBI assigned at this
13 time with this likelihood ratio was moderate support;
14 correct?

15 A. Yes. But that is, again, based off
16 published -- this table was published by the
17 Association of Forensic Science Providers. We use
18 that table for this information.

19 Q. Are you the only one that uses this table?

20 A. Not from my understanding, no. I believe
21 other laboratories use it. We have changed it
22 slightly when we switched to GlobalFiler; however,
23 this is a peer-reviewed published table. So I'm
24 assuming there are a lot of labs that use this.

25 Q. Do you know where it was peer reviewed?

1 A. I do not know off the top of my head, no.

2 Q. Is it accurate?

3 A. I'm not sure what you mean by that.

4 Q. Is the table accurate?

5 A. It is just a qualitative equivalent. Each
6 person is going to have to depend or use that
7 information, and apply how much support they believe
8 is present in that sample. However, it is used to
9 assist individuals reading my report kind of where
10 the numbers I'm providing fall. So for -- in this
11 case, 28 is lower on the spectrum. So it ranges from
12 2 to over 700 billion. So this table is just meant
13 to show what that means.

14 Q. So you didn't actually say it was accurate.
15 I appreciate your response. But it's literally right
16 above weak support. And then uninformative; correct?
17 It's not extremely strong support; yes?

18 A. Yes, that's correct.

19 Q. And so if it was extremely strong support,
20 then the ratio would be a million to less than 700
21 billion; yes?

22 A. That's correct, yes.

23 Q. Based on this standard or this chart in
24 your report; correct?

25 A. Correct, yes.

1 Q. Are you familiar with the State of New York
2 versus Hillary case?

3 A. I am, yes.

4 Q. And there was Frye hearing in that case?

5 A. Yes.

6 MS. SIRIGNANO: Okay. Your Honor, I'd like
7 to offer the transcript of the Hillary case. It's
8 found at either the People of the State of New York
9 versus or Oral N. Hillary; State of New York, County
10 Court, County of St. Lawrence; that's in Canton, New
11 York. And liked to mark this as CG-G, DNA.

12 MS. ARMIJO: Your Honor, I've never seen
13 this before.

14 THE COURT: Hold on just a second. Let me
15 get the marking of the exhibit. I thought this was
16 going to be C. Do you have some in between?

17 MS. SIRIGNANO: I might, Your Honor, yes.
18 I have -- I had marked E.

19 THE COURT: You haven't offered any of
20 these?

21 MS. SIRIGNANO: You're right, Your Honor.
22 I didn't introduce C or D. I introduced E. And I
23 might introduce F. But that one is G. Do you want
24 me to renumber them?

25 THE COURT: Why don't we mark this as C,

1 because if you don't offer them, it will just make
2 the record confusing. Is that okay?

3 MS. SIRIGNANO: Yes, Your Honor.

4 THE COURT: All right. Ms. Armijo?

5 MS. ARMIJO: I've never seen this before.
6 Our witness has never seen it before. She's not a
7 witness in this. And it appears -- I don't know who
8 testified, but she did not testify. So I would
9 object on relevance grounds. And unless this witness
10 is intimately familiar with this, or we can have a
11 proffer of why this is relevant, I'm going to object
12 to it.

13 THE COURT: All right. Well, I think I
14 have read that transcript before in another case, so
15 I'm familiar with it. I think it has enough
16 relevance here. So I'll admit -- anybody else have
17 any objection or thoughts on it?

18 All right. So I'm going to admit Chris
19 Garcia's Exhibit C.

20 Ms. Sirignano.

21 MS. SIRIGNANO: Thank you, Judge.

22 BY MS. SIRIGNANO:

23 Q. You stated, Ms. Smith, that you were
24 familiar with this case?

25 A. I am familiar slightly, yes.

1 MS. SIRIGNANO: May I approach?

2 THE COURT: You may.

3 Q. I've handed you page 75 of that transcript.
4 Dr. John Simon Buckleton testified at this hearing;
5 correct?

6 A. Yes, he did.

7 Q. And Dr. Buckleton is one of the co-founders
8 or co-developers of the STRmix program, yes?

9 A. He is, yes.

10 Q. And he testified at this hearing in New
11 York, yes, about the likelihood ratios in STRmix;
12 correct?

13 A. That is correct, yes.

14 Q. And looking at page 75 there, he talks
15 about likelihood ratios between one and 1,000 to be
16 inconclusive; correct?

17 A. I don't see that. I might not have -- half
18 the question is cut off.

19 MS. SIRIGNANO: Oh, I'm sorry. May I
20 approach, Your Honor?

21 THE COURT: You may.

22 Q. Here's page 74.

23 A. Yes, that is what Dr. Buckleton does say in
24 this testimony.

25 Q. And he is one of the producers of this

1 software; yes?

2 A. On the software, the likelihood ratio and
3 the number and the meaning behind it is not
4 specifically about the software. It's about a
5 likelihood ratio, and what the likelihood ratio
6 means. The software is just a tool to calculate the
7 likelihood ratio. But he does state that, yes.

8 Q. And so the reason why he said that the
9 likelihood ratios range between one and 1,000 to be
10 inconclusive is because that's the range where the
11 greatest occurrence of false positives or false
12 inclusions occur; correct? Based on your training
13 and experience, Ms. Smith.

14 A. We know that the lower the number, when
15 more and more individuals, that can occur. It was
16 seen very, very infrequently. However, that is
17 reflective of the statistics. So again, a statistic
18 of 28 is very low on the spectrum.

19 Q. And that's when the too close to call
20 instances occur, and the data is uninformative
21 regarding the likelihood ratios because the greatest
22 occurrences of false positives; yes?

23 A. I would not say it's unreliable. It is
24 still an estimate. Again, there is still more
25 support that Mr. Garcia is potentially a contributor.

1 However, that likelihood ratios is what is important,
2 and that is 28. That is lower on the spectrum. So
3 it could match a lot of people. So there could be a
4 lot of people that could be included as potential
5 mixture.

6 Q. So the 28 percent likelihood ratios could
7 include what you just said, "a lot of people"; yes?

8 A. That is possible, yes. And again, it's not
9 a percent. The likelihood ratio is not a percent.
10 The likelihood ratio is 28.

11 Q. Likelihood ratio is 28. And the word I
12 used was "uninformative." And Dr. Buckleton said
13 that one to 1,000 would be inconclusive because it
14 would be hard to differentiate between a donor and a
15 non-donor, what you just said; yes?

16 A. Yes. That is part of -- that's his
17 opinion. Again, the FBI Lab did not have an
18 inconclusive zone for Identifiler. We just reported
19 the statistic. We're just trying to give the
20 information, and how that is applied is up to the
21 individuals reading our report.

22 Q. But you do now, right, based after this
23 Hillary testimony with this GlobalFiler kit, you all
24 now have changed your likelihood ratios where one to
25 100 is inconclusive; yes?

1 A. We have done that with GlobalFiler. But
2 that was not based off the Hillary testimony. That
3 was actually based off of our validation and what we
4 saw in validation.

5 Q. So your validation study completely changed
6 the likelihood ratios a month after you did your
7 report here; correct?

8 A. It was using a different kit. GlobalFiler
9 has a lot more locations. So, in general, if a
10 person cannot be excluded visually, the likelihood
11 ratio numbers that you get are very high. They can
12 be in the nonillions, for instance, or in the
13 decadillions. They get extremely, extremely high.
14 So, therefore, when we did our validation, we looked
15 at an inconclusive zone and did determine that
16 anything within -- up to 100 on the support for the
17 proposition that a person was included, would be
18 consider inconclusive. But that is based off the
19 GlobalFiler validation, not the Identifiler.

20 THE COURT: Ms. Sirignano, would this be a
21 good time for us to take our first afternoon break?

22 MS. SIRIGNANO: It would be, Your Honor.

23 THE COURT: All right. We'll be in recess
24 for about 15 minutes.

25 (The Court stood in recess.)

1 THE COURT: All right. Let's everyone grab
2 a seat. Make sure everybody has got an attorney.

3 All right. Ms. Smith, I'll remind you that
4 you're still under oath. Ms. Sirignano, if you wish
5 to continue your cross-examination of Ms. Smith, you
6 may do so at this time.

7 MS. SIRIGNANO: I do, Your Honor. Thank
8 you.

9 THE COURT: Ms. Sirignano.

10 BY MS. SIRIGNANO:

11 Q. Ms. Smith, before we broke, or before we
12 had a break, you were testifying about this
13 likelihood ratio chart on page 004, B 004, of your
14 report. And then right before we took a break, we
15 were talking about the GlobalFiler kit, and that the
16 chart has changed; correct?

17 A. It has changed since we went online with
18 GlobalFiler, that is correct, yes.

19 Q. And the one to 100 range is now -- the
20 qualitative equivalent is inconclusive, correct, for
21 GlobalFiler?

22 A. Yes, one to 99 is inconclusive, that's
23 correct.

24 Q. And on your report -- can you back this
25 out. You, in Footnote 1, stated that you did use the

1 GlobalFiler kit; correct?

2 A. That was only used on the reference sample.
3 That was not used on the evidence sample. The
4 interpretation is based off the evidence, not the
5 reference samples. But I did use it in this case
6 specifically for the sample for Mr. Garcia only.

7 Q. And so you had both kits used in this case;
8 correct?

9 A. Yes, because the samples were submitted a
10 year apart, so we went online with GlobalFiler
11 January of this year, and so we started amplifying
12 DNA after that date with GlobalFiler.

13 Q. So there is really no scientific basis,
14 based on the earlier chart and the new chart, that
15 would show that there is moderate support versus
16 inconclusive in the likelihood ratio of 28; correct?

17 A. 28 is a number that just provides
18 information. That chart was based off a
19 peer-reviewed, published chart that was already
20 available that when we discussed it with other
21 laboratories at SWGDAM, they were also using that
22 chart. Since we switched to GlobalFiler, we decided
23 to base it specifically on our most up-to-date
24 validation studies, so that is changed slightly by
25 including the inconclusive zone. But also that has a

1 lot to do with the fact that GlobalFiler has a lot
2 more loci in its kit.

3 Q. Right. And the 28 that was found was
4 inconclusive with this GlobalFiler, the new chart;
5 correct?

6 A. No. A likelihood ratio of 28 would be
7 inconclusive, but that would have to be from a sample
8 that was amplified with GlobalFiler, which this is
9 not. So it is completely separate.

10 Q. But did you testify that the buccal swab
11 from Garcia was amplified with GlobalFiler; correct?

12 A. The buccal sample was. But the
13 deconvolution using STRmix was done using Identifiler
14 on the samples, not GlobalFiler. The kit used for
15 the buccal sample was irrelevant for this.

16 Q. I just don't think that there is any
17 scientific basis for these labels and --

18 MS. ARMIJO: Objection.

19 THE COURT: Sustained.

20 MS. SIRIGNANO: Sorry, Your Honor.

21 Q. The qualitative equivalent, moderate
22 support, is based on what scientific basis?

23 A. In my report you can see that it is in
24 accordance with standards published by the
25 Association of Forensic Science Providers. So that

1 was based off of their peer-reviewed publication. We
2 feel that providing information to what that
3 likelihood ratio is, is the best policy. So when we
4 calculated the likelihood ratios using Identifiler,
5 at that time, we always provided a number in both
6 directions, even with exclusions. When there was
7 more support for a possible exclusion, we still
8 provided those numbers as well.

9 Q. But you didn't really answer my question.
10 I asked what scientific basis was used to come up
11 with these qualitative equivalents?

12 A. I don't specifically recall what is in
13 their publication. However, we know that a one is
14 uninformative. That is how a likelihood ratio works.
15 We also know that when you have low numbers, you're
16 going to have less support. And that is explained on
17 testimony. How, you know, a number of 28 means it
18 could -- the DNA could have originated from
19 Mr. Garcia, but also could have originated from other
20 individuals. And that is why this equivalent is
21 helpful. We're just trying to be helpful to the
22 individuals reading our report.

23 Q. And the helpfulness changed from moderate
24 support to inconclusive with the new GlobalFiler
25 amplification kit; correct?

1 A. You can't compare the two, because one is
2 using Identifiler and one is using GlobalFiler. They
3 are different kits because we have different number
4 of loci. Identifiler is looking at 15 locations, so
5 the numbers are generally lower for Identifiler.
6 With GlobalFiler, you're looking at 21 locations that
7 likelihood ratios are calculated for, so they're
8 higher. So you can't compare the two charts to one
9 another like that.

10 MS. SIRIGNANO: May I have a minute?

11 THE COURT: You may.

12 Q. You've testified a few times that you used
13 both kits to come up with this report. It would seem
14 intuitive that you could compare these two charts.

15 A. I can see why you think that. However, the
16 GlobalFiler amplification kit was utilized on the
17 known reference sample; however, the deconvolution,
18 the mixture deconvolution was used using the
19 Identifiler kit. Because at the time the gun and
20 holster were processed, we were only using the
21 Identifiler kit.

22 A known reference sample, it does not
23 matter what kit you use. We obtain knowns from other
24 laboratories that may have used a kit that we don't
25 even use at the FBI Laboratory, and we can still use

1 it, because STRmix is not taking into account what
2 kit was used, when it comes to the known reference
3 samples. It only matters what kit was utilized for
4 the evidence items.

5 So, in this case, the only relevant kit to
6 the STRmix deconvolution is Identifiler, which
7 utilizes this equivalent chart.

8 Q. Let's turn to item 4 on page CH-B 085.
9 Item 4 is the holster that you analyzed; correct?

10 A. Yes, it is.

11 Q. And do you recognize page 85 here?

12 A. I do.

13 Q. And that's your 22-page summary report or
14 summary sheet?

15 A. That is correct. This is my STRmix
16 deconvolution for item 4, which is the holster, and
17 its comparison to Mr. Garcia.

18 Q. And let's turn to page B 087. And the
19 header on this page is "Per locus likelihood ratios";
20 correct?

21 A. That is correct.

22 Q. And so this data, where did this come from?

23 A. This is the likelihood ratios calculated
24 for Mr. Garcia, based off of the mixture
25 deconvolution that was used for the holster.

1 Q. And were all categories used in this
2 analysis, meaning Caucasian, SEH, SWH, EAH?

3 A. Whenever I calculate a likelihood ratio, I
4 always calculate it for at least these four. We
5 always calculate for Caucasian, African American,
6 Southeast and Southwest Hispanics. The one that is
7 reported is the lowest likelihood ratio. We always
8 report the lowest number.

9 Q. Which was the lowest number?

10 A. In this case, the lowest number was for the
11 Southwest Hispanics. Here, it was 8.3 to the 15.
12 However, that number was not written in the report,
13 because it was greater than 700 billion, which met
14 our source threshold. So it will just say Mr. Garcia
15 was the source of one of the contributors to this
16 holster.

17 Q. And the greater than 700 billion, that
18 source threshold, where did that number come from?

19 A. The FBI has been using source thresholds
20 for many years. Other laboratories are also using
21 it. This threshold was deemed by the FBI Laboratory.

22 Q. Have there been publications, other than
23 the validation studies on these source thresholds?

24 A. There are publications based off of the
25 source attribution thresholds. Different

1 laboratories do use different thresholds, though.
2 Some laboratories may use the world population. Some
3 may use just the United States population. At the
4 FBI, we use the world population, then we increase
5 that up to 700 billion, just to ensure that we
6 wouldn't expect to see it again.

7 Q. So you use the world population, and you
8 increase 700 billion?

9 A. So at the time when we came up with this
10 number, the world's population was 7 billion. So we
11 increased that to 700 billion, just to be cautious.

12 Q. And these numbers are determined by the
13 FBI; correct?

14 A. That threshold that we use is determined by
15 the FBI. Other labs also have source attribution,
16 and that would be based off their own policies.

17 MS. SIRIGNANO: Your Honor, pass the
18 witness at this time.

19 THE COURT: Thank you. Ms. Sirignano.

20 Any other defendants have cross-examination
21 of Ms. Smith? Mr. Lowry?

22 EXAMINATION

23 BY MR. LOWRY:

24 Q. Good afternoon, Ms. Smith.

25 A. Good afternoon.

1 Q. I just wanted to follow-up briefly on the
2 validation issue. Are you familiar with a gentleman
3 named Bruce Budowle?

4 A. I am, yes.

5 Q. Who is Bruce Budowle?

6 A. Bruce Budowle is an individual who used to
7 work for the FBI Laboratory. I believe now he's
8 still at the University of North Texas.

9 Q. How long did he direct the FBI Analytical
10 Laboratory?

11 A. I don't know specifically. He has not been
12 with the lab since I've worked there.

13 Q. Okay. But it's fair to say he directed the
14 FBI's Analytical Laboratory for a number of years?

15 A. He was not a director. He worked as a
16 research individual that assisted in the bringing of
17 a lot of our softwares online, yes.

18 Q. And it's software regarding the DNA
19 analysis?

20 A. Policies and procedures, yes.

21 Q. Are you familiar with Mr. Budowle's work
22 that's critical of using low copy number DNA samples?

23 A. I am not specifically, because the FBI Lab
24 does not do low copy number.

25 Q. Well, and the reason I'm asking is, I

1 remember at the beginning of Ms. Sirignano's
2 presentation, you were looking at the nanograms of
3 DNA available in these two samples, sample 3 and
4 sample 4. Do you recall that?

5 A. Yes, the FBI Lab aims for one nanogram;
6 however, we have processed samples with less than
7 that.

8 Q. Right. And the ideal sample would be a
9 nanogram?

10 A. According to our validation, yes. But we
11 can go, again, much lower.

12 Q. But the ideal sample for a DNA test would
13 be a nanogram; correct?

14 A. Yes, that's what we strive for.

15 Q. And I believe, looking at items 3 and item
16 4, they are roughly about half a nanogram?

17 A. Roughly, yes.

18 Q. And on top of that you're claiming that
19 that half a nanogram was four separate individuals?

20 A. Roughly, yes.

21 Q. And so if you just took the half a
22 nanogram, divided by four, there would be relatively
23 little DNA per individual in the sample; correct?

24 A. Yes, if they were contributing similar
25 amounts. But yes, you're right.

1 Q. The assumption is they're contributing
2 equally?

3 A. Correct.

4 Q. But traditional DNA samples, if you assume
5 equal contribution, they would all be in the arena of
6 low copy number samples?

7 A. They would have little template DNA, yes.
8 Low copy number testing is specifically using
9 enhanced techniques to see the DNA, which is known to
10 pick up drop-in, which is the false alleles. That is
11 using, for instance, increased number of
12 amplification cycles. At the FBI we're using 27 for
13 Identifiler. So, for instance, maybe using 30. That
14 is an enhanced technique for low copy number testing.

15 Q. Right. But I'm not asking about the
16 techniques to accommodate for low copy numbers. I'm
17 saying just the raw data would be in the arena of low
18 copy numbers?

19 A. It would be lower template, yes.

20 Q. And let's be fair to the Court here. By
21 "lower template" you mean there is less DNA per
22 individual in the sample?

23 A. Yes, this is a low-level sample, that is
24 correct.

25 Q. And by low-level sample, we mean a sample

1 that's probably under 250 picograms?

2 A. Potentially. I can't state specifically
3 how much DNA each person is contributing.

4 Q. Right. And again, with the assumption a
5 half a nanogram divided by four.

6 A. Right. But that would be less than 250,
7 right.

8 Q. And 250 picograms, that's relatively the
9 industry standard for defining low copy number?

10 A. That is possible, yes. Like I said, we
11 don't do low copy numbers, so I don't know
12 specifically what those labs quantify it as.

13 Q. That brings me to STRmix. Because the
14 reason you use STRmix is so you can circumvent
15 historical problems with low copy numbers; isn't that
16 right?

17 A. I wouldn't say it's to circumvent it, no.
18 The low method we would see information that we just
19 could not utilize. So STRmix allows us to use the
20 entire profile. Our validation of STRmix looked at
21 lower than one nanogram templates of DNA. So we
22 looked at degraded samples. We looked at low copy
23 samples for that validation.

24 Q. Let's talk about that validation quickly,
25 because I didn't really catch it either on direct or

1 the cross-examination. You validated the STRmix
2 using the equipment at your laboratory at Quantico;
3 correct?

4 A. Correct, yes.

5 Q. And for a validation to be done correctly,
6 you have to use the same equipment using the same
7 software?

8 A. Yes. So in order to do a validation, we
9 use -- however we're planning on using it for
10 casework is what you must validate. So you have to
11 validate the appropriate equipment, the software, the
12 STR typing kits, everything, yes.

13 Q. Because the validation in your lab, in
14 Quantico, for the Identifiler kit with, you know, a
15 specific -- oh, I forget what you call the actual
16 chromatography machine, but might be different from
17 your lab to a lab in New Mexico?

18 A. Correct. That's why it's important that
19 the validation be done in-house. All labs must do an
20 internal validation first. And there is actually a
21 program within STRmix called Model Maker that assists
22 you in doing that.

23 Q. So for STRmix, you validated using the
24 nanogram as baseline?

25 A. No. So STRmix -- so GlobalFiler

1 amplification, when we brought online GlobalFiler,
2 independent of STRmix, that is where we deemed that
3 GlobalFiler behaves a certain way using one nanogram.
4 So that's what we would aim to, so we didn't miss any
5 information. STRmix, though, during the validation
6 we looked at a variety of types of mixtures, a
7 variety of amounts of DNA. So that we knew it
8 crossed all the potential types of samples we would
9 expect to see in casework.

10 Q. So let's talk about the validation for
11 STRmix. For a single source sample, how low did you
12 go with the DNA quantity in your validation studies?

13 A. I don't recall specifically how low. I
14 know that we went down to the picogram level. I
15 don't remember specifically what that level was at
16 this point.

17 Q. So do you recall that, for a single source
18 sample, that your validation studies got below 250
19 picograms?

20 A. I know that there were definitely samples
21 at about 300 picograms. But I don't recall exactly
22 how low it went. So I don't recall that.

23 Q. Now, let's talk about a two-source sample,
24 a known two-source sample. Did you validate for
25 STRmix going down below 250 picograms per source?

1 A. So as we increased the number of
2 contributors in our validation, we decreased -- we
3 definitely adjusted the ratios. So for two people,
4 we tested a 20 to one, a one to one, a one to 20, and
5 that varied in the amount of DNA. For a four-person
6 mixtures we did the same thing. We did like a 16 to
7 one, to one to one, all the way down to a one to one
8 to one to one mixture ratio. And that covered where
9 some of those people were very, very low levels, in
10 the hundreds of picograms. And we actually saw in
11 certain instances those people dropped out, or could
12 not be seen in the profile. So we did cover that
13 range in our validation.

14 Q. Okay. Well, I'm not sure you answered my
15 question. I'm going to ask it again. Because you
16 said you validated down into the hundreds of
17 picograms. And my question is: Did you validate the
18 two-source sample below the low copy number, the low
19 template number of 250 picograms?

20 A. I believe we did. I believe we went down
21 to 125 picograms. But I would have to refresh my
22 memory. I can't recall specifically, because so many
23 mixtures were run.

24 Q. So you can't recall, is the answer today?

25 A. Specifically for two person, no.

1 Q. What about for a three-person sample?

2 A. Again, I don't recall the exact amount of
3 DNA. I do know that we degraded the samples, using
4 UV light, and also using clean, fresh samples. And
5 we saw a variety of things. But I don't recall
6 exactly how low we went. I believe it was 125
7 picograms, though.

8 Q. But that would be in the validation
9 studies?

10 A. Yes, it would.

11 Q. And those were the validation studies you
12 said you'd have to talk to your legal department
13 about disclosing to the defense team?

14 A. We don't typically hand over validation
15 studies as part of discovery. So, yes, if those were
16 requested, they would have to go through our legal
17 department, yes.

18 Q. But for today's purposes, talking to this
19 Court, you can't say definitively whether you
20 validated the STRmix for two-source samples below 250
21 picograms?

22 A. I do have the peer-reviewed publication of
23 our validation with me. I can refer to that, if
24 you'd like, so I can refresh my memory exactly how
25 low we went.

1 Q. Sure.

2 THE WITNESS: Your Honor, do you mind if I
3 refer to my notes?

4 THE COURT: Any problem with that, Mr.
5 Lowry?

6 MR. LOWRY: Not at all.

7 THE COURT: All right. You may do so.

8 A. Okay. We did actually cover that range.
9 So in our internal validation of STRmix for the
10 interpretation of single source and mixed DNA
11 profiles paper, which is published in the Forensic
12 Science International Genetics, it does list out a
13 summary of the mixtures that we tested. Those
14 mixtures, depending on the number of contributors,
15 ranged from .006 nanograms up to one nanogram.

16 Q. Okay. So that's well above the 250
17 picogram level?

18 A. That is much lower, yes.

19 Q. The 250 picogram is much lower than the .6
20 nanogram?

21 A. It's .006 nanograms.

22 Q. Got it. 60 picograms?

23 A. Yes, I believe that's correct. I would
24 need a calculator. I'm not great with math in my
25 head.

1 Q. Now, if we're talking about 60 picograms,
2 that's probably -- for everybody else in the
3 courtroom, that's probably one or two cells?

4 A. It's very low cells, yes. Typically, it
5 would just be a couple of cells, yes.

6 Q. And how -- for that level of validation,
7 was that a single-source sample?

8 A. So for a number of contributors, that .006
9 to .9 nanograms, that was for two contributors. For
10 four contributors, it was .05 nanograms to 3.2
11 nanograms. And that template range varied on the
12 contributor.

13 Q. So pass that back to me one more time. Was
14 that three contributors?

15 A. Three contributors range from .021 to one
16 nanogram contributor template.

17 Q. And so in this case, we're talking about
18 you assumed four contributors to the sample?

19 A. Correct. But, again, I want to reiterate
20 that the quantification is an estimate. So, again,
21 we don't know exactly how much DNA starting material
22 we had.

23 Q. Correct. And that's one of the problems
24 with mixtures, is you never know how much a single
25 contributor provided in the mixture; isn't that true?

1 A. We never know how much anybody contributed
2 to a mixture. We have to use our training,
3 education, and experience to determine the
4 interpretation of that.

5 Q. Well, you really -- you think looking at an
6 electropherogram you can deduce how much of a sample
7 any one contributor made?

8 A. No, you can't do that. I agree with you.
9 You look at the entire profile, and see if you're
10 seeing a low-level mixture, a high-level mixture. Do
11 I think drop-out may have occurred? If I don't think
12 drop-out occurred, then I'm going to interpret the
13 profile differently.

14 Q. So I just want to come back to the four
15 contributors to a sample. Did the FBI validate for
16 STRmix below 250 picograms per contributor?

17 A. The chart in this paper specifically states
18 that the FBI Laboratory, for a number of contributors
19 of four, it ranged from .05 nanograms to 3.2
20 nanograms. So about exactly the amount of total DNA
21 that I saw here, about half a nanogram.

22 Q. Right. So that was for a half a nanogram
23 for any single contributor?

24 A. For this one table, that's what it appears,
25 yes. Again, I would have to read the entire paper

1 again to be sure. But --

2 Q. My question is really simple here. For
3 samples, where we're assuming there are four
4 contributors, did the FBI validate for any -- for a
5 mixed sample with four contributors -- that you can
6 give valid results for a single contributor in the
7 mix that was less than 250 picograms?

8 A. I don't know specifically the number.
9 However, I do know the FBI validated a range of low
10 level and high level template amounts. That gives me
11 confidence in the way STRmix interpreted the sample.

12 Q. But when you're talking about template
13 amounts, you're talking about the total template
14 amount?

15 A. Right, but we're making the assumption that
16 we know it's 250. And I know for a fact that this
17 profile is not a one to one to one to one mixture, so
18 that's not an appropriate assumption for this case.

19 Q. So let's talk about this case. What would
20 you estimate the ratios would be?

21 A. Well, STRmix -- I don't recall the exact
22 ratios. I would need to do that calculation. We
23 don't do that specific calculation, but it estimated
24 approximately a 42 percent contributor, a 30 percent
25 contributor, a 20 percent contributor, and

1 approximately a 7 percent contributor. So I don't
2 know specifically what those ratios are without doing
3 the math. But it is not a one to one to one to one.

4 Q. Out of those percentages, which one of
5 those percentages of the sample would you attribute
6 to the potential match for Mr. Garcia?

7 A. I cannot state specifically which one he
8 is, if he is in there at all. And the reason for
9 that is that is not how STRmix works. However,
10 STRmix attributed him to the 30 percent contributor.
11 If that is, in fact, from Garcia, which we cannot
12 say.

13 Q. And if you assume for the sake of argument,
14 it's a 30 percent contributor, and you started out
15 with a half a nanogram, he's roughly, what, 125, 150
16 picograms?

17 A. Approximately. But, again, quantification
18 is an estimate, so I can't correlate that directly to
19 that.

20 Q. Okay. But I want to come back to where I
21 started with. Mr. Budowle's critique of DNA analysis
22 for a low template DNA is that the whole analysis
23 becomes unstable and unpredictable given the low
24 template amounts of DNA?

25 A. I don't agree with that assessment. I am

1 not familiar with specifically what paper you're
2 referring to. From my understanding, low copy number
3 testing, if he's referring to that, is very different
4 than low template amount. Our validation covered a
5 variety of ranges. And we see these types of
6 mixtures routinely on firearms and other items in
7 which the individual is most likely touching, versus
8 body fluid. So I'm completely confident in my
9 results. And the 28 is reflective of that low-level
10 sample.

11 Q. Ms. Sirignano asked you about drop-in. And
12 you said that in your validation studies, the FBI
13 didn't come across drop-in as part of the validation
14 studies; is that correct?

15 A. That is correct. With Identifiler, we saw
16 no instances of drop-in. So when we set our
17 parameters for our amplification, we assumed a
18 drop-in rate of zero for STRmix because of that
19 validation.

20 Q. And by the time you get to your
21 electropherogram, and you're looking at the peak
22 heights -- now refresh my recollection, is there
23 absolutely no analytical, no stochastic threshold?
24 Using STRmix, do you have a stochastic or analytical
25 threshold for when you're calling an allele for a

1 peak height?

2 A. So STRmix uses a threshold of 50. So
3 anything below 50 is considered potential background
4 noise. Anything above 50 is considered a true peak,
5 unless the analyst, including myself, looks at the
6 data and deems that to be an artifact; then it would
7 be removed.

8 We also have a threshold of 200 for
9 Identifiler. Therefore, what that means is, if the
10 peak is below 200, we know we may not see its partner
11 peak. So, for instance, if a person is 7, 10, we may
12 only see the 7. And that is also part of our
13 validation. STRmix does not use that second
14 threshold, because it is a continuous model and
15 models for drop-out.

16 Q. So if I understand what you said, I'm
17 trying to understand that, you don't use the 50 RFU
18 for STRmix?

19 A. STRmix does use the 50 RFU; that's the
20 analytical threshold. It does use that. Anything
21 above 50 is considered a peak, not background noise.

22 Q. Unless the analyst attributes that peak to
23 stutter or some kind of known artifact?

24 A. If the analyst attributes that to a known
25 artifact, such as bleed-through or pull-up, STRmix

1 models stutter, so we do not delete out stutter
2 necessarily.

3 Q. I think that you said STRmix had been
4 validated at the state level?

5 A. Both federal and state. We're a federal
6 laboratory, and we validated STRmix. However, it's
7 also being used by other federal laboratories, in
8 addition to state laboratories.

9 Q. What state court has validated, in a
10 Daubert challenge, STRmix for a four-contributor
11 sample?

12 A. I don't specifically know the number of
13 contributors that have been challenged. I do know
14 that Michigan is one that did approve the use of
15 STRmix. And I know there are others. I believe
16 there is seven or eight now. But I don't know the
17 mixture ratios that they had.

18 Q. What I'm talking about is a specific
19 scientific challenge to STRmix. I mean, there would
20 be a difference between challenging STRmix for a
21 single contributor sample, as opposed to a
22 four-contributor sample, wouldn't it?

23 A. It would be a different challenge.
24 However, if the laboratory validates them both, then
25 I would say that they're both scientifically valid.

1 Q. And my final question would be: For a
2 four-contributor sample, do you have the validation
3 studies that show any single contributor less than
4 250 picograms can get a reliable test result using
5 STRmix?

6 A. I can't recall the specific numbers, no.
7 But I do know we have the four-person mixture
8 validation. And I could find that information out.

9 MR. LOWRY: No further questions.

10 THE COURT: Thank you, Mr. Lowry.

11 Any other defendants have cross-examination
12 of Ms. Smith?

13 All right. Ms. Armijo, you have redirect
14 of Ms. Smith?

15 REDIRECT EXAMINATION

16 BY MS. ARMIJO:

17 Q. Starting where we left off. In the states
18 that you were talking about with Mr. Lowry, is that
19 the same scientific validation that you would
20 consider this case?

21 A. Yes, it is. They would have done their own
22 internal validation at the specific laboratories.
23 But it would be on the same software, and an internal
24 validation would have to be done, just like we did.

25 Q. You were asked on cross-examination about

1 how you protect against bias in this case. And how
2 is it that STRmix protects against bias?

3 A. STRmix does not have a means of having
4 bias, because it is just a software program.

5 Q. Let's see. Now, you were talking about the
6 STRmix validation version that you use. Can you
7 explain a little bit about the extensive validation
8 that the FBI does with the version that you have
9 done?

10 A. Whenever the FBI Laboratory receives a new
11 version from the ESR, or the software -- or the
12 company that generated STRmix, they do an in-depth
13 validation to show that it's behaving the same way as
14 the previous validation. So they will potentially
15 run new samples. They will run the same data through
16 both software versions to ensure they're getting the
17 same exact result. And we do that every time we have
18 a new version. So we will not bring on a new version
19 unless it meets those validation criteria.

20 Q. Was that done in this case?

21 A. Yes, it was.

22 Q. Now, you were talking on cross-examination
23 about the validation where you get the low-level
24 split-out into two, I believe -- I'm sorry, I was
25 trying to write quickly. You said that the only

1 thing that would cause would be false exclusions; is
2 that correct? Do you know what I'm referring to?

3 A. Yes, I know what you're referring to.
4 That's not necessarily true. So, if you
5 underestimate the number of contributors, so, for
6 instance, if you call it a three-person mixture, and
7 it is really a four-person mixture, then you could
8 falsely exclude people, because you're not seeing --
9 you're not attributing to the correct number of
10 individuals. If you falsely increase the number of
11 contributors, meaning it is really a three-person
12 mixture, but you call it a four-person mixture, it
13 will potentially generate a very low-level extra
14 contributor, where you could falsely include.
15 However, in our validation studies, we saw that it
16 remained near uninformative.

17 Q. And you indicated the validation paper that
18 was published is regularly available on the internet?

19 A. Yes, that is correct. Both the
20 developmental and the internal validation papers are
21 readily available.

22 Q. Now, Ms. Sirignano admitted into
23 evidence -- actually, I don't believe I see it. Do
24 you have -- maybe you have it -- the transcript from
25 that New York case.

1 A. I only have two pages of that transcript up
2 here.

3 MS. ARMIJO: Can we have the full copy of
4 it, please?

5 Q. Are you familiar with this case?

6 A. I am vaguely familiar, yes.

7 Q. Okay. And what were the issues in this
8 case?

9 A. In this case, specifically, the state in
10 which this hearing was set, their laboratory was not
11 validated for using STRmix. They did not -- they had
12 not done a validation study. They were not using
13 STRmix on casework. So they requested -- or someone
14 requested John Buckleton to use the data from the
15 laboratory and run it through STRmix. The problem
16 with that is STRmix does require you to generate the
17 data on your own instruments, because the software's
18 parameters are based off of your own validation. So
19 the parameters he used were not based off of the
20 laboratory's data. They were just estimates. And it
21 was found that it was not suitable. And he could not
22 testify to it, because he did not run the samples
23 himself through the laboratory.

24 Q. And in this case, did the FBI run samples
25 themselves?

1 A. Yes. All of this data came off of our own
2 instruments that have been validated for using
3 software.

4 Q. Is the FBI validated for using STRmix?

5 A. Yes, we are.

6 Q. So is that a distinction from the New York
7 case?

8 A. Yes, it's a large distinction.

9 Q. And you were talking about comparing the
10 different charts with Ms. Sirignano. Can you explain
11 the differences between the charts, when you're
12 talking about the numbers?

13 A. Are you referring to the kits that were
14 used? I'm not sure which charts.

15 Q. She was talking about the charts for the
16 numbers, when you talked about the number 28, as
17 opposed to being a moderate support?

18 A. Yes. So the charts in this report that's
19 relevant for this case is based off of a published
20 chart that was available to us when we brought STRmix
21 online. Likelihood ratios were newer to us as well.
22 So we referred to individuals who are familiar with
23 the qualitative equivalent. So we went to a
24 peer-reviewed publication and used those -- that
25 chart for identifying when we went online with this.

1 When we switched to GlobalFiler, because it
2 uses so many more locations, we routinely saw numbers
3 that were much, much higher. So based off of our
4 validation, we deemed to have an inconclusive zone up
5 to 100.

6 Q. And is that why you indicate that, with the
7 28, it already takes that into account?

8 A. It does. I mean, the 28 is a low number on
9 that chart, when you look at how large it can get.
10 So that is part of why we provide the numbers. It's
11 just information. It means that there was more
12 support that Mr. Garcia was a contributor, but it
13 does not necessarily mean that he is the only
14 possible contributor.

15 Q. Now, in reference to the amount of samples
16 in this case, was it, in your opinion, enough of a
17 sample?

18 A. Yes, it was.

19 Q. And did the amount of the sample impact any
20 of the validation of your testing?

21 A. No, it did not.

22 Q. And he was using the term "low copy," and
23 you were using the term "low template." What is the
24 distinction?

25 A. For me, personally, low copy refers to a

1 technique in which you take low-level samples and try
2 to increase the amount of sample you have by using
3 techniques that are going to make your samples
4 potentially contain drop-in and other artifacts.
5 It's a way to increase the level of DNA you have,
6 which we do not do at the FBI Laboratory.

7 Q. And in reference to the STRmix, where you
8 said it was seven or eight other states in which
9 there have been Daubert hearings and it's been
10 approved. Is it the same scientific validation that
11 you use?

12 A. Yes, it is. And again, that was an
13 estimation. I don't know the exact number. It's
14 around six or seven. But that is based off of
15 STRmix. And the individual labs do their own
16 validation, but it is the same software, yes.

17 MS. ARMIJO: I have nothing further. Thank
18 you.

19 THE COURT: Thank you, Ms. Armijo.
20 All right. Ms. Smith, you may step down.
21 Thank you for your testimony.

22 THE WITNESS: May I be excused, Your Honor?

23 THE COURT: May she be excused?

24 MS. SIRIGNANO: Your Honor, I'd like to
25 review the SOPs that were just given to me and

1 re-call her in the morning just briefly, to see if I
2 could use any of that materials in my
3 cross-examination.

4 THE COURT: How do you feel about that, Ms.
5 Armijo?

6 MS. ARMIJO: Cross-examination of whom?

7 MS. SIRIGNANO: Of the witness.

8 MS. ARMIJO: Your Honor, I think that that
9 would be going more towards -- and I think the Court
10 gave a great deal of indulgence to Ms. Sirignano.
11 This was more than just a Daubert hearing. This was
12 more of a cross-examination and preview and fishing
13 expedition. So we would request that she be excused
14 at this point, unless there is something specific
15 that she can point to.

16 THE COURT: I don't think --

17 MS. SIRIGNANO: Your Honor, I can't look at
18 materials or rely on materials or cross-examination
19 using materials that I haven't had five minutes to
20 review. And, unfortunately, this is a Daubert
21 hearing, and despite my colleague's continued
22 thoughts about us doing a discovery fishing
23 expedition, all these questions and the SOPs -- which
24 is why I asked for them months ago -- is within the
25 purview of Daubert and within cross-examination. And

1 because the Government waited until the afternoon of
2 the hearing to provide us with these documents,
3 Mr. Garcia shouldn't be penalized to have the
4 opportunity to review it and cross-examine the
5 witness on them. She referred to the SOPs on
6 multiple instances here, and I haven't even had a
7 chance to review them.

8 THE COURT: Well, I'd asked earlier -- you
9 filed something, I guess, last night about -- I
10 needed something from your expert as to why the FBI's
11 DNA policies and procedures were essential to the
12 Daubert hearing. And Ms. Arvizu, I guess, stated in
13 the document you filed last night, she says, in sort
14 of an ambiguous last sentence on page 2, lines 6
15 through 12, she said, "Without access to laboratory's
16 policies and procedures, an independent reviewer
17 would be unable to evaluate whether the subject
18 testing conformed to applicable requirements of" --
19 and here is where it's not clear, it says, "FBI
20 policies, laboratory procedures, and consensus
21 standards." If FBI modifies those three clauses,
22 then again, that's what I've been saying all along,
23 I'm not sure that anybody is telling me that these
24 are necessary for their Daubert hearing. So she's
25 not clear. It's a very conclusory sentence. I was

1 hoping for more.

2 And so without more, Ms. Smith, you are
3 excused. I still don't have any foundation as to why
4 this is necessary for a Daubert hearing. Thank you
5 for your testimony.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: All right. Does the Government
8 have further witnesses or evidence it wishes to
9 present on the Daubert hearing?

10 MS. ARMIJO: No, Your Honor. We have
11 nothing further.

12 THE COURT: All right. Do the
13 defendants -- Ms. Sirignano, do the defendants have
14 any witnesses or evidence it wishes to present on the
15 Daubert hearing?

16 MS. SIRIGNANO: No witnesses at this time,
17 Your Honor.

18 THE COURT: All right. Do you wish to
19 argue in support of your motion?

20 MS. SIRIGNANO: I do, Your Honor.

21 THE COURT: All right. Ms. Sirignano.

22 MS. SIRIGNANO: Your Honor, we've heard
23 from the witness, the Government's witness, the
24 Government's expert today, about the process that
25 they use to run this DNA, and then the STRmix

1 program, both the earlier version and this new
2 version.

3 And what we did hear today was that this
4 software program has -- the new version has not been
5 peer reviewed. There hasn't been anything publicly
6 published about this STRmix version; that they've got
7 all these internal validation tests and reports, but
8 nothing within the public realm, other than the
9 earlier version of the software that explains how
10 they validated this.

11 And I submit, Your Honor, that this DNA
12 testing on this low-level sample, as you heard from
13 the witness, is very unreliable. It's prone to false
14 positives. It's uninformative. It's too close to
15 call. And the developer of the STRmix software
16 testified in that earlier case, although it being
17 different, that this likelihood ratio of 28 would be
18 inconclusive. And the reason for that is the
19 possibility of false inclusions. The witness stated
20 specifically that she could not say that Mr. Garcia
21 was in this mix at all, or specifically, that he was
22 in the mix, or whether he was in the mix at all.

23 So based on the math and based on the
24 science, they assumed that he was a 30 percent
25 contributor to this number 2 individual. And I

1 believe, based on Mr. Lowry's and my
2 cross-examination of this witness, a low-level sample
3 with a likelihood ratio of 28 is very sketchy, Your
4 Honor. It's uninformative. And we would ask at this
5 time, Your Honor, that because the witness testified
6 that she can't deduce who contributed to the sample,
7 especially in a low-level sample like this, that you
8 use your gatekeeping function under Daubert and the
9 other cases, and exclude this DNA evidence from
10 trial.

11 Thank you.

12 THE COURT: All right. Thank you, Ms.
13 Sirignano.

14 Anyone else wish to argue in support of the
15 Daubert challenge?

16 All right. Ms. Armijo, if you wish to
17 respond?

18 MS. ARMIJO: Yes, Your Honor.

19 Quite simply, that's more of an argument
20 for a jury as far as the levels of it, and how much
21 weight to give it. And you don't hear a DNA analyst
22 ever say: This is Chris Garcia's sample. They
23 always talk about numbers; that's why it's one in 28,
24 one in 700 billion. That's how you they determine
25 it. They're not able to ever say that something has

1 come specifically from a person. So that's not
2 surprising.

3 In this case, the software was validated by
4 the FBI. The sample was sufficient. It may not have
5 been a great one. But she even testified that they
6 see these samples routinely on items such as
7 firearms, as opposed to DNA fluids, like a rape kit
8 or things like that, that this sample is sufficient.
9 And it clearly -- the method used by the FBI is a
10 valid scientific method; that the Court should allow
11 her to testify as a result on the firearm and the
12 holster.

13 THE COURT: All right. Thank you,
14 Ms. Armijo.

15 Anyone else have any rebuttal?

16 All right. Ms. Sirignano, anything final?
17 I'll give you the final word.

18 MS. SIRIGNANO: No. Thank you, Your Honor.

19 THE COURT: Well, I think the defendants
20 that joined this motion were trying to establish a
21 large gap between what the FBI was doing and maybe
22 what they should be doing. And I'm not sure that the
23 gap is that great. It seems to me that the
24 Government has established that the FBI's procedures
25 are in line with what other laboratories and experts

1 would do.

2 I think, at most, the arguments have gone
3 to a misapplication or incorrect testing or
4 inadequate testing, rather than that the methodology
5 here is somehow flawed or not peer reviewed, or not
6 scientific. And I think that's the purpose of the
7 Daubert motion. There may be a great deal over the
8 last day that goes to cross-examination, to weaken
9 the Government's case in reliance on the information.
10 But as far as the methodology that the FBI is using
11 generally, and in this case, I think it's
12 scientifically sound and satisfies the Daubert
13 standard.

14 So I will deny the motion to exclude
15 Ms. Smith, and allow her to testify as to what is in
16 her report, and as to what was disclosed in today's
17 testimony.

18 All right. My understanding is that the
19 next issue that we go to will be the motion for
20 additional discovery regarding monetary payments to
21 inmate informant witnesses. I know that there was --
22 no hearing was requested here, but I think to
23 actually get through some of these issues, and try to
24 resolve them, I'm going to need counsel to give me
25 input. I think this might have been yours,

1 Ms. Harbour-Valdez?

2 MS. HARBOUR-VALDEZ: No, Your Honor. It's
3 Mr. Castle.

4 THE COURT: Mr. Castle. I knew it was this
5 corner over here. Mr. Castle.

6 MR. CASTLE: Thank you, Your Honor.

7 You know, I really don't have a lot more
8 argument other than what I put in my motion.

9 THE COURT: I have read everything, but let
10 me make sure that I understand what you're asking.
11 So refresh my memory on this motion.

12 MR. CASTLE: Well, what we've gotten so far
13 is a summary of payments. We haven't gotten a lot of
14 information, like how it came about that someone got
15 \$2,000 or 40,000, such as did they request it? Did
16 they express a need? We don't know how it was paid.
17 We don't know what kinds of agreements were made in
18 return for the money; that it was a quid pro quo of
19 sorts. We don't have receipts that they've given.
20 We don't know whether -- I think the Court heard
21 earlier testimony in one of the last couple weeks
22 where Agent Acee talked about how some payments are
23 made for expenses and some are made for services
24 rendered, I think is what I indicated. So we don't
25 know whether these amounts are one or the other

1 obviously. We don't want to be in a situation where
2 we're cross-examining, and it turns out it is for
3 gasoline to come to court.

4 But all these things are relevant to the
5 bias of the witness, the motivation of the witness in
6 testimony.

7 THE COURT: I guess you're trying to fit
8 all this into Giglio, right?

9 MR. CASTLE: Exactly. And I think the
10 Government basically said -- originally what they
11 asked us is they wanted to check with the FBI to see
12 what they would be willing to share. I'm not sure
13 that's really been standard. I think the standard is
14 what they're required to share. And I'm not sure
15 whether I need to argue a lot, if they're going to
16 agree to turn this over.

17 THE COURT: Well, let's see what they say.
18 I guess I'm inclined to think this is probably
19 impeachment material that's Giglio. You've just got
20 to get it and get it to them. Ms. Armijo?

21 MS. ARMIJO: Your Honor, I think we could
22 shortcut a lot of this. We are agreeing to turn
23 over, on all of the CHSSs that we have them on, FBI
24 files on, or payments to, the entire files, which
25 would include all this information. So anything that

1 they request that's specific to the files, we will,
2 in fact, turn over.

3 It does require some FBI redaction. And
4 then it will come to our office for personalized
5 information redaction. But we are agreeing to give
6 over the files that should include everything that
7 they're requesting. If, after they review the files,
8 there are specifics they can come to us and say:
9 What about this or what about that. But I think that
10 that's the first step, and we should be able to
11 resolve these issues giving the complete file.

12 THE COURT: With that representation of
13 what they're willing to do, which sounds like it's
14 what they've got to do under Giglio, is there
15 anything more you need on this motion, Mr. Castle?

16 MR. CASTLE: The only thing I would add, is
17 that a lot of times promises are not in written form.
18 So, for example, the FBI manual that I referenced in
19 the motion itself encourages agents to provide
20 bonuses to cooperating witnesses after trial. If
21 information like that has been communicated orally,
22 and not put in writing, I think their obligation
23 extends to that.

24 So I think it's a great start that they're
25 going to look at that.

1 THE COURT: Let me ask you, Ms. Armijo,
2 would you agree that, if the FBI is making those sort
3 of promises, it would fall within the scope of the
4 request?

5 MS. ARMIJO: Probably so, yes. But I can't
6 think of any instances in which that is being done.
7 But if there is, and it will fall under that request,
8 then it will be noted.

9 THE COURT: All right. Could you also do
10 this: That, after you talk to probably Mr. Acee, and
11 he can talk to his FBI, would you send a letter and
12 say: With the materials we're producing, we know of
13 no other promises or benefits that are being bestowed
14 other than what's going to be revealed by the
15 documents produced?

16 MS. ARMIJO: Yes, Your Honor.

17 THE COURT: Does that get you on that, what
18 you need, Mr. Castle?

19 MR. CASTLE: Almost. Because I think
20 what's more --

21 THE COURT: You're on a roll, you're going
22 to keep asking.

23 MR. CASTLE: Exactly. I've had a couple of
24 weeks of rest, and I'm charged up.

25 But I think what's relevant, in addition to

1 what the FBI has promised, is what's been requested
2 by these witnesses. So these are individuals who are
3 well schooled in the art of receiving what they want.
4 And sometimes they want more than what the FBI gives.
5 And I think their bias would be revealed additionally
6 by anything they requested that Agent Acee in his
7 decision decided not to provide. I think there was
8 some testimony that when requests come in, it has to
9 be screened, and evaluated, and they may or may not
10 give it to the particular witness. I think those
11 requests also have to be memorialized in some
12 fashion, and provided to the defense.

13 The only other comment I'd make is that
14 this was ordered to be produced back in November.
15 Here we are, at the end of December, along with all
16 the other Giglio material. And so any speed with
17 which we could receive this material would be
18 appreciated. And I think an order from the Court
19 would be in line with that.

20 THE COURT: Let me take these in bites.
21 Ms. Armijo, is Mr. Acee going to be the only one
22 that's going to know or have the information that
23 people were requesting things that may or may not
24 have been given? Are there going to be any other FBI
25 agents, personnel involved?

1 MS. ARMIJO: May I have a moment?

2 THE COURT: Certainly.

3 MS. ARMIJO: I think, even if it wasn't
4 him, it would be reported to him.

5 THE COURT: All right. Could we do this?
6 Could we have Mr. Acee sit down on each cooperating
7 witness, and just think about it, and think about if
8 anything was requested; if he has to talk to somebody
9 else, and then could he do something for you that
10 indicates to the best of his memory, and any review
11 of documents he has to make, that these are the
12 requests that were made and not honored?

13 MS. ARMIJO: Yes.

14 THE COURT: All right. And I know you've
15 got the timeline or deadline. But now, does that
16 sort of handle substantively the request, Mr. Castle?

17 MR. CASTLE: I believe it does, Your Honor.

18 THE COURT: All right. When could we have
19 these three categories: One, documents, and then the
20 two representations that would be made largely by Mr.
21 Acee through the U.S. Attorney's Office?

22 MS. ARMIJO: Well, the documents
23 themselves, I think would be easier, because it's
24 just a matter of copying them. So maybe on -- I
25 guess, January 1st is a holiday -- maybe January 2.

1 THE COURT: Would that deadline be
2 acceptable, Mr. Castle?

3 MR. CASTLE: Can I turn around and look at
4 the folks that are going to trial first?

5 THE COURT: Can y'all live with that, end
6 of business on January 2?

7 MR. CASTLE: Seeing no hands wagging.

8 THE COURT: All right. So I'll set that
9 for the deadline for all three of those categories:
10 Documents and the two representations.

11 Ms. Sirignano?

12 MS. SIRIGNANO: Quick question. Does that
13 mean it's going to go to Mr. Aoki on the 2nd or does
14 that mean it's going to come to us on the 2nd,
15 because there is some turnaround time we need to take
16 into consideration.

17 MS. ARMIJO: When I say we give something,
18 we give it to Mr. Aoki. We don't know what he does,
19 we're not privy to that information. So when we
20 disclose something, it goes to Mr. Aoki.

21 THE COURT: What sort of volume are you
22 looking at on this particular production?

23 MS. ARMIJO: Each informant file, of the
24 official informants is probably, on average, about 25
25 pages or so. So it's not a great deal. It's not

1 like the four boxes that we're going to be disclosing
2 from a request from the Perez camp. So it should be
3 much smaller than that.

4 THE COURT: Could we do on this one, given
5 the squeeze we're beginning to get, because we'll be
6 swinging within 30 days of the trial, with a January
7 2 production, could you send one set of materials to
8 Mr. Castle, and then the rest to Aoki? And then, Mr.
9 Castle, if you need to distribute it to some key
10 people, then you can submit the cost of that copying
11 on your CJA voucher.

12 MR. CASTLE: I will take that on, Your
13 Honor.

14 THE COURT: Could we do that on this single
15 issue, Ms. Armijo?

16 MS. ARMIJO: Yes, as long as we're not
17 going to keep doing it, because it's a big burden for
18 our staff to keep producing it to different people.

19 THE COURT: Well, I'll let y'all promise
20 each other, but I'm not going to be bound by any
21 promises. So I may have to order something as we get
22 closer to trial. So if you'll do it on this one,
23 let's take this one and do it on this one, and then I
24 may have to be ordering some different stuff as we
25 get closer. But I think we have an agreement on this

1 one.

2 So I'll so order. Anything else on that
3 order or that motion, Mr. Castle?

4 MR. CASTLE: No, Your Honor.

5 THE COURT: Anybody else?

6 MS. ARMIJO: Your Honor, just so we're
7 clear. These documents should be -- when we send it
8 to Mr. Aoki, we always make it clear that they are
9 sealed. And so this, obviously, would be under the
10 protective order, and we will note that in the letter
11 to Mr. Castle.

12 THE COURT: Everybody in agreement on that?

13 MR. CASTLE: Yes, Your Honor.

14 THE COURT: All right. I've worked out
15 something with Ms. Armijo and Mr. Castle. Anybody
16 have any objection to that?

17 Ms. Fox-Young, you're up first, so I'll
18 give you first.

19 MS. FOX-YOUNG: No objection, Your Honor.

20 I just want to get into a little bit of
21 detail. The Court heard from Billy Cordova and
22 Special Agent Acee last week about the kinds of
23 promises that Mr. Castle references that might not be
24 written down. Special Agent Acee told the Court that
25 he -- the Government had promised that Mr. Cordova

1 wouldn't be charged in the RICO, as a result of his
2 cooperation. I think that's precisely the sort of
3 benefit that wouldn't be documented. And I think Ms.
4 Armijo just said they would submit something that
5 says that there were no other benefits. And so I
6 just ask the Court if the Court might order, when
7 Special Agent Acee goes through and looks at requests
8 that were made and not honored, that he also document
9 those types of benefits that have been afforded.

10 Thank you, Judge.

11 THE COURT: All right. Do you understand,
12 Mr. Acee, and I'm speaking through Ms. Armijo, that's
13 the kind of stuff you need to be thinking of?

14 MR. ACEE: Yes, Your Honor.

15 THE COURT: Is that agreeable, Ms. Armijo?

16 MS. ARMIJO: Yes, Your Honor.

17 THE COURT: All right. Mr. Lowry.

18 MR. LOWRY: Yes, Your Honor. Just briefly.
19 Just to follow-up on what Ms. Fox-Young said. There
20 were benefits -- and I just want to make sure we're
21 clear with the Government and Mr. Acee -- that we
22 know that Eric Duran worked in other jurisdictions.
23 And I believe in our Brady-Giglio motion we had
24 defined the benefits that any cooperating witness
25 would receive, could run from any manner of federal

1 departments. So we just want to make sure the
2 financial benefits from other jurisdictions of the
3 Department of Justice are included in the disclosure
4 as other types of benefits, like securing dismissals
5 of traffic tickets, criminal cases, that kind of
6 thin. I mean, we're of the mind that Mr. Duran has
7 been the beneficiary of a number of interventions on
8 his behalf with regard to those types of things. And
9 we haven't had any disclosure that I can lay my
10 fingers on. So if this would be included as well, it
11 would be much appreciated.

12 THE COURT: All right. And you're
13 listening to this, Mr. Acee?

14 MR. ACEE: Yes, sir.

15 THE COURT: And, Ms. Armijo, are you
16 agreeable to directing Mr. Acee to include that sort
17 of category in the information he's going to provide?

18 MS. ARMIJO: And just so that we're clear,
19 if there is documentation as to things, he's not
20 including it. What we're looking for specifically is
21 things that are not documented?

22 THE COURT: Yes.

23 MS. ARMIJO: Yes, Your Honor.

24 THE COURT: Everybody in agreement how
25 we're going to handle Mr. Castle's motion?

1 All right. The next motion is a motion for
2 advanced notice of witnesses to be called by the
3 Government. Again, this was one that Mr. Castle and
4 Mr. Cooper didn't ask for a hearing on, but I thought
5 it would make sense for us to talk about it, because
6 it's hard for me to probably work out something with
7 everybody, if I'm just sitting in my chambers doing
8 an order.

9 So here's my thoughts. Let me give you my
10 thoughts, and then see if we can hammer out something
11 that works. I probably am not inclined to tell the
12 Government how far in advance to disclose their
13 witnesses. I realize that some of you have
14 indicated, persuasively, that that's going to require
15 you to probably have experts sitting around listening
16 to testimony longer than what would be the case if
17 the Government would give advance notice. So I have
18 a couple of thoughts on this issue. One, in a trial
19 like this -- and I did them as a lawyer, I've done
20 them as a judge -- it's hard for us to get through
21 this thing if we don't cooperate a little bit. It's
22 one thing for me to order something. It's another
23 thing, we just try to cooperate. What I typically
24 see, and what I typically did when I was practicing,
25 as everybody at the end of the day, tell people who

1 their witnesses are going to be for the next day.
2 And that is generally a gentlemen's and gentleladies'
3 way of trying to make a trial bearable for everybody
4 involved, so they have some anticipation of what is
5 going to occur the next day. It would be nice -- I'm
6 speaking now to the Government's table -- it would be
7 nice to see if we could have a little bit more
8 advance knowledge on people where the experts are
9 going to be involved. And that's because I have an
10 interest, and the Government and us all as taxpayers
11 have an interest in not having experts sitting around
12 any more than is going to be necessary.

13 So I was going to propose this: Without
14 ordering the Government to give advance warning, see
15 if they would be willing to give some advance
16 knowledge of -- notice of when they're going to call
17 somebody. And then, with the expert witnesses, if
18 the defendants could send the Government a letter,
19 and say, All right, we're going to want our experts
20 here for these witnesses. And if the Government
21 could try to tell the defendants to the best of their
22 knowledge when that limited universe -- if you put
23 every witness on there, this isn't going to work, but
24 if you tell the Government that these three or four,
25 however many witnesses, we're going to have experts

1 here, can you tell us in advance, to the best of your
2 knowledge, when, at least within some range, those
3 experts, those witnesses are going to be there, it
4 might help us not have experts here all the time,
5 make sure the experts are here when they're supposed
6 to be, and try to save taxpayers some dollars.

7 So I think I know -- well, Mr. Castle, it's
8 your motion. What do you think about the proposal
9 I'm putting on the table? You may have some
10 fine-tuning to that. But, you know, everybody that's
11 experienced a long trial like we're about to have,
12 knows at some point we've got to work together to get
13 through this thing. And this was the way I was
14 thinking about handling your motion.

15 MR. CASTLE: Well, the Government is right.
16 There are no rules requiring anything. And so,
17 frankly, this is completely within the Court's
18 discretion, so we'll take whatever we can get.

19 I would analogize to exhibits. I mean,
20 there is no rule that requires the parties to, in
21 advance of trial, try to give a good faith list of
22 our exhibits. But the Court knows that that's --

23 THE COURT: I'm probably going to lean on
24 people on exhibits.

25 MR. CASTLE: Right, right.

1 THE COURT: Otherwise, it just gets
2 unwieldy to get through one of these things.

3 MR. CASTLE: And it's along those lines
4 that I made this request. I mean, I think there is
5 the issue of experts, which is one, but I think there
6 is an issue of what crime base are you going to be
7 dealing with for a while? I mean, I have seen this
8 group of prosecutors. They're going to be organized.
9 They're not going to be sprinkling in, you know, one
10 crime base witnesses with another crime base
11 witnesses.

12 THE COURT: Well, in fact, if you look at
13 the motions, what I understand them to be
14 requesting -- and I'm favorable to this motion,
15 although I want to hear what the defendants say -- I
16 think what they're saying, they want to take these
17 things in categories, they want to put Mr. Acee on
18 the stand, knock out some testimony, and some other
19 witnesses. And then they may want to bring Mr. Acee
20 back, let him do it again. I'm inclined to allow
21 that, because I think it will help the defendants
22 compartmentalize the parts of this trial. And I
23 really think they're allowed to do that anyway. So,
24 if we have sort of an agreement on that aspect, it
25 may help the Government be more helpful on your

1 request.

2 MR. CASTLE: I wasn't responding to that
3 motion, but it seems reasonable to me, because I
4 think the only way to logically explain this to a
5 jury -- and frankly, I'd love it if they were
6 illogical with the jury -- but I don't think they're
7 going to be that way. I think they're going to
8 produce evidence concerning certain counts that are
9 related. Then we'll do the next counts and proceed
10 in that fashion. Obviously, there is going to be
11 some enterprise evidence that they're going to put on
12 generally. So I would ask for that because, in our
13 trial, which is trial number 2, if they put on Counts
14 1 and 2 first, and then, for the next eight weeks
15 they're going to be focusing on evidence that doesn't
16 relate to Counts 1 and 2, I'm telling -- well, Mr.
17 Cooper and I are going to tell the rest of our staff
18 to go home, and not charge the federal government.

19 And so there is a practical need for it.
20 But I think it's a practical need that goes both
21 ways. Because I think that what the defense would do
22 when we were told in advance what witnesses are going
23 to be called, my guess is they're going to ask: How
24 long do you think cross-examination is going to take?
25 And if both sides play close to the vest with their

1 cards, as far as the order in which witnesses are
2 going to be called, it's going to be utter chaos.
3 Nobody can plan anything. They're not going to know
4 if we're going on for three days with a particular
5 witness or expert, and that will put their schedules
6 off.

7 And I do understand what the Court is
8 saying: Let's try to be collegial about this. And I
9 really hope we can be on that. My goal, in filing
10 this motion, was to hopefully get the Court to make
11 some orders, so we all knew what that situation --
12 how we're going to operate here.

13 So I think the Court had indicated both,
14 you know, the experts, and hopefully the night
15 before -- but I would hope also what crime base we're
16 going to be dealing with as a general concern.

17 And frankly, Judge, the only reason not to
18 do this, not to tell the other side what witnesses
19 you're going to call is tactical gamesmanship, to try
20 to get an advantage on the other side. I'm not sure
21 that's what we're after here, as far as fairness.

22 And the final thing I would note, is the
23 prosecution asked for any rules to be for both sides.
24 And I would agree to that. I mean, I think we have
25 to tell them what witnesses -- we're going to be

1 telling each other, we're going to be tripping over
2 each other, the different defense teams. So I think
3 that's fair, if we could operate in that fashion.

4 THE COURT: All right. Thank you, Mr.
5 Castle.

6 Any other defendant want to speak to this
7 issue?

8 All right. Ms. Armijo, what will you give
9 us?

10 MS. ARMIJO: Your Honor, I think that that
11 is reasonable, as long as the defense -- we certainly
12 can do it the night before, because I know that in
13 long trials that's what we routinely do. And we
14 certainly can help out with longer term things, as
15 long as we have who it is that they're interested in,
16 knowing that there might be some wiggle room.

17 I would add one caveat to that. I would
18 ask that the information as to the witnesses the next
19 day, as it pertain to cooperators, not be relayed to
20 the defendants.

21 THE COURT: Let me ask the defense lawyers:
22 Could you live with that; that if -- whether it's the
23 night before, or in advance, that the Government,
24 when they're going to put witnesses on, not be
25 conveyed to the defendants themselves? Live with

1 that, Mr. Castle?

2 MR. CASTLE: Yes, Your Honor.

3 THE COURT: All right. Anybody that can't
4 live with that? So I think the more people can live
5 with that, the more the Government is going to feel
6 more comfortable, if it's attorneys' ears information
7 only, or attorneys' eyes, they're going to be more
8 comfortable about sharing strategy in advance.

9 Mr. Maynard?

10 MR. MAYNARD: Yes, Your Honor. I'm just
11 not sure -- I mean, I can anticipate I may have a
12 need, on the spur of the moment, because a certain
13 witness is coming up the next day, and is one of the
14 informants or cooperators, and I may want to talk to
15 my client about it.

16 THE COURT: Well, if you can't, then I'm
17 not going to probably order the defendants -- the
18 Government to disclose anything. So if you're going
19 to take that position, you're probably not going to
20 get information the day before.

21 MR. MAYNARD: Well, if it puts me in a
22 bind, I would rather have the information, even if I
23 can't share it with my client than to not have it at
24 all.

25 THE COURT: Well, you've got to pick your

1 side here.

2 MR. MAYNARD: Obviously --

3 THE COURT: Tell the Government what you're
4 going to do.

5 MR. MAYNARD: Well, I'll have to keep it
6 from my client.

7 THE COURT: Okay.

8 MR. MAYNARD: I mean, I don't like it, but
9 if that's going to be the rule, I have to accept it.

10 THE COURT: All right.

11 Anything you want to add, Mr. Cooper? Ms.
12 Sirignano?

13 MR. COOPER: No, Your Honor. Thank you.

14 THE COURT: Anything, Ms. Sirignano?

15 MS. SIRIGNANO: Your Honor, I'm happy with
16 this agreement, I'm not objecting to it.

17 I think part of our anxiety on the defense
18 is that the Government's witness list right now is
19 280-plus --

20 THE COURT: We're going to talk about that.
21 I know it's an issue and a problem, and we'll -- I
22 can't guarantee a solution. But we're going to work
23 on it.

24 MS. SIRIGNANO: Thank you, Judge.

25 THE COURT: All right. So the Government

1 has an assurance from the defense counsel that if you
2 will disclose witnesses in advance, they will not
3 disclose it to the defendants.

4 So let me ask this: Let me see if I can
5 push the Government a little bit to try to help the
6 defendants get ready for this. And this is just an
7 idea. I -- and again, we might need to work on it.
8 But would the Government be willing to give the
9 defendants, at some point, a rough outline of how
10 you're going to try the case? And I don't mean by
11 that, paragraph 1A, little 1, little 2, telling them
12 step by step. But would you be willing to give them
13 a big outline of, you know, this week is going to be
14 enterprise, this week is going to be Counts X and X,
15 so they have some sense of where the witnesses are
16 likely to show up, so that Mr. Castle and Mr. Cooper
17 can do -- and the other lawyers can do -- kind of
18 send their staff home, and go on airplane mode for a
19 little bit? Can something like that be provided?
20 And I'm not trying to pin down time. I'm not trying
21 to talk about the detail of it. Could we get
22 something like that?

23 MS. ARMIJO: Yes, Your Honor. I think we
24 could do that before the trial starts. It's not
25 something that would be generated immediately. But

1 we could certainly do that. And again, with the
2 caveat that -- for instance, as a hypothetical, if we
3 can say we want to have evidence on the Javier Molina
4 murder during these days, well, then, they're going
5 to anticipate Mr. Cordova coming in on those dates.
6 And so we would again request that that specific
7 information not be shared for safety concerns,
8 because I think the marshals have their hands full
9 right now. And so we would agree to do that in
10 general terms.

11 THE COURT: All right. If the Government
12 is willing to do that, put out a general outline of
13 when the boxes they're going to have -- and that's
14 the way I'm thinking of it, so I hope this is helpful
15 to somebody -- boxes of how they're going to do the
16 trial, without filling it all in, would again, the
17 defense lawyers again agree to not disclose that
18 general trial outline to clients? Mr. Castle, could
19 you agree?

20 MR. CASTLE: I agree, Your Honor.

21 THE COURT: Is there anybody that would not
22 agree?

23 All right. Let's see if we can push a
24 little further on the experts. What do you think
25 about my idea of the defendants' -- and it's not

1 going to work if everybody says, okay, you know, I
2 need to know on all 210 witnesses -- but if you can
3 identify some key witnesses that your expert has got
4 to be here for, could you send a letter to the
5 Government, and perhaps, we get an agreement from the
6 Government that the Government would try to identify
7 those people as soon as possible as to where
8 generally they're going to try to call those
9 witnesses, so you could have your experts here?
10 Maybe everybody sort of discipline themselves --
11 we've got five defendants; maybe everybody limit
12 themselves to three witnesses or something that
13 they're going to tell the Government, could you tell
14 us where -- and that will be about 15 witnesses --
15 could you tell us generally where they're going to
16 be, and try to keep us informed as the trial goes
17 along? What do you think about that idea, Mr.
18 Castle? I think this is more -- maybe Ms. Sirignano
19 was the one that talked a lot about the experts. It
20 may not have been so much your concern. But what do
21 you think?

22 MR. CASTLE: That seems to be a reasonable
23 accommodation. The only other thing I would note is,
24 I'm not sure whether the Court is contemplating
25 allowing some experts to perhaps call in and listen

1 to the testimony, if they can't make it here? I
2 don't know if we filed that, or there has been a
3 motion on that, or whether it's been covered by the
4 pretrial.

5 THE COURT: I'm agreeable to that. We'll
6 see what the Government says here in a minute. But
7 rather than having the defendants sit back there,
8 have it on here, and they can listen to it. I'd ask
9 the experts to -- assuming nobody tells me that
10 that's broadcasting, so it violates the Chief
11 Justice's order against broadcasting -- if I can have
12 an agreement from the experts that they're not going
13 to be sitting there recording it, or putting it on
14 the internet, or something like that, and get me in
15 trouble. But assuming nobody telling me that that's
16 a problem, I'm receptive to that. And it doesn't
17 seem to me a great deal different than somebody
18 sitting back behind Ms. Sirignano for two or three
19 days, and somebody sitting here and doing that.

20 (A discussion was held off the record.)

21 THE COURT: Ms. Sirignano, it sounds like
22 Mr. Castle is sort of in agreement with that. What
23 do you think?

24 MS. SIRIGNANO: In agreement, Your Honor.

25 My only request would be that we get that

1 letter from the Government -- I'm happy to write that
2 letter over the next couple of days. I've got three
3 experts that travel nationwide and internationally,
4 and so it's very important for our defense to make
5 sure that they're available during the time that we
6 need them here. And so my request would only be that
7 we work with each other to narrow that timeframe
8 down, so we have continuity of the testimony. And
9 not for just us to call our witnesses, but for them
10 to be here when the Government witnesses are present.

11 And if the phone, if that's something that
12 you'd agreed to with the phone, that possibly could
13 work, so long as they're not testifying in another
14 proceeding, Your Honor.

15 THE COURT: All right. Let's do this:
16 I've got to give Ms. Bean a break. Let me take a
17 short break, and take about a 15-minute break and
18 we'll come back in, and see if we can hammer this
19 out.

20 During the break, I'd like all the defense
21 lawyers to take a look at my opinion in Vigil, and
22 the Government to look at it, too. I haven't had a
23 chance to study it, but I'd like to pick that up next
24 on the plea agreements. I'd like to go to that
25 motion. It's always nice if I do something

1 consistent in this case with what I did in another
2 case. But it's not essential.

3 So if that answered all your questions, I
4 remember working on that. But I think we can
5 probably hammer out a compromise on what we're going
6 to do with plea agreements and addendums. So we'll
7 be back in 15 minutes.

8 (The Court stood in recess.)

9 THE COURT: All right. We'll go back on
10 the record. It looks like every defendant has an
11 attorney. Make sure we look around, help your
12 co-defendants out.

13 All right. Are you on the phone, Ms. Wild?
14 Ms. Wild, do you have your mute button on? Ms. Wild
15 was expressing some concern to Ms. Standridge about
16 the experts being in the back. And I was going to
17 tell her that I think what she's concerned about is
18 that the AO has a policy, as you know, when we do
19 and -- because of the size of these courtrooms --
20 when we do voir dire, we often use a microphone to
21 amplify, particularly the jurors' voices. I think
22 the AO allows that. But once the trial begins, I
23 think because of the frequency the microphones are
24 on, they don't allow those to be on. I don't think
25 that applies to telephones.

1 Is she is on now? Ms. Wild, are you on the
2 phone? Ms. Wild, are you on the phone?

3 THE CLERK: Yes, sir.

4 THE COURT: I was telling them that you had
5 some concerns about having the experts on the
6 telephone listening. But I was wondering if what you
7 were thinking about was that my memory is that the AO
8 had a policy that when we use the microphones in voir
9 dire, that it was okay to use them then, but once the
10 trial started, i.e., the jurors raise their hand and
11 are sworn in, for double jeopardy purposes, that we
12 had to cut the microphones off because of the
13 frequency could be picked up outside of the
14 courtroom. Is that what you were thinking of?

15 THE CLERK: It may be. I'm looking in my
16 file right now. Hold on. Yes, there is. We did get
17 an AO policy about the wireless microphone security
18 concern.

19 THE COURT: I'm not seeing anything -- any
20 problem with experts listening in -- not testifying,
21 but listening in to testimony. Are you thinking of
22 something that I'm not thinking of?

23 THE CLERK: Potentially.

24 MR. CASTLE: Judge, I might be able to
25 short-circuit this.

1 THE CLERK: Do you want to discuss it now?

2 THE COURT: Well, is it something you need
3 to discuss with me?

4 THE CLERK: I think we better talk.

5 THE COURT: Hold on, Mr. Castle. Let me
6 see what Ms. Wild is thinking of. Hold on.

7 (A discussion was held off the record.)

8 THE COURT: Well, let me think about Ms.
9 Sirignano's request -- or maybe it was Mr. Castle's
10 request -- of having a line open. I guess, if I
11 could figure out a way, you know, how during these
12 hearings, people are bouncing on and off, and I don't
13 have time to get a clear record of who is on and who
14 is off -- if I just have an open phone, I don't have
15 a lot of control who can call in and participate. So
16 if we can figure out some solution to that, maybe
17 it's doable. But it might create some problems if I
18 just got an open phone line and people calling in and
19 out on our "meet me" conference line.

20 MR. CASTLE: I think we have a solution,
21 Judge.

22 THE COURT: Okay.

23 MR. CASTLE: Some of the attorneys for the
24 defense have requested daily transcript. And I think
25 that's up with the budgeting attorney. And I was

1 just talking to --

2 THE COURT: Has Carey approved that?

3 MR. CASTLE: I think it's pending for her.

4 But our experts are not going to be looking to see
5 the demeanor of another expert, they are listening
6 for content. You can get content from a transcript
7 so I think at this point in time, we're not making a
8 request for them to be able to call in. I think, if
9 we get rejected the idea of daily transcript, then we
10 might reraise it. But I think that might be a very
11 efficient way and less costly way to deal with the
12 expert who is not appearing.

13 THE COURT: Well, I don't want to look a
14 stipulation or a gift horse in the mouth. But if I
15 understood what Mr. Sirignano saying, she was talking
16 about having her expert here for some fact witnesses.
17 Am I wrong?

18 MS. SIRIGNANO: Probably not, Your Honor.
19 It would be in -- to consider the Government's
20 experts.

21 THE COURT: All right. Maybe that solves
22 it. I thought Ms. Waters had approved the dailies
23 for the trial. But maybe I'm ahead of the game.
24 So --

25 MS. SIRIGNANO: Mr. Villa had made that

1 request, I believe. And I think some of us wanted
2 dailies, and some of us wanted real-time during the
3 hearings. And I believe Your Honor has the real-time
4 as well during trial; is that correct?

5 THE COURT: I have real-time.

6 MS. SIRIGNANO: Yes. So Mr. --

7 THE COURT: I have real-time all the time.

8 MR. CASTLE: Are you on airplane mode, Your
9 Honor?

10 MS. SIRIGNANO: I think there is discussion
11 about real-time and daily transcripts.

12 THE COURT: My knowledge is that I have not
13 seen a request for real-time from anybody. But I
14 thought I had approved, or Ms. Waters had approved
15 the request for daily. So that's where I am on -- as
16 far as my memory is concerned.

17 MS. SIRIGNANO: Your Honor, would it be
18 possible to get the real-time?

19 THE COURT: Well, why don't y'all talk
20 to --

21 MS. SIRIGNANO: Ms. Waters.

22 THE COURT: -- Ms. Waters, and we'll go
23 from there.

24 MS. SIRIGNANO: Will do, Your Honor. Thank
25 you.

1 THE COURT: All right. Before I hear from
2 you, Mr. Castellano, is what I have sort of hammered
3 out with at least on the defense side, agreeable to
4 everybody? I can put in this, as can you tell, I'm
5 not ordering the Government to do any of this. But
6 it's going to be a gentlemen's and gentleladies'
7 agreement, and once we agree, I consider that a
8 stipulation. I will enforce it.

9 Does everybody see the difference? I do,
10 but nobody else does. Just like any other
11 stipulation. I mean, once it's there, I agree. But
12 I'm not going to -- you know, we're a little bit at
13 the mercy of the Government here, because I'm
14 probably not going to order them to do much as far as
15 disclosure. Does everybody agree with this? Because
16 you're agreeing not to share some stuff with your
17 clients. And I'll enforce that with my powers, if
18 everybody agrees.

19 MR. BLACKBURN: Judge, what does the
20 real-time cost?

21 THE COURT: Well, I don't know.

22 MR. BLACKBURN: I mean, I thought that you
23 can get it, we just flip a switch and it comes over
24 here, too.

25 THE COURT: No, she's shaking her head.

1 MR. BLACKBURN: Besides the add-on cost for
2 you, I mean, I thought it was --

3 THE COURT: It's a big deal to make it
4 available for clients, for parties. Certainly, in
5 these big civil cases that I have, and stuff, where
6 costs are not apparently a problem, they pay for it,
7 and want it. But it's not routine in any case
8 because the costs are significant.

9 MR. BLACKBURN: I'll talk to Ms. Bean about
10 it.

11 THE COURT: But it's different than what
12 I've got up here.

13 All right. Anybody else on the defense
14 side? Everybody can live with what we've hammered
15 out?

16 All right. Let's see what Mr. Castellano
17 says.

18 MR. CASTELLANO: Based on what's been
19 stated, Your Honor, it may not come to this. My only
20 concern about having experts on the phone would be
21 that, if it does come to that, that we identify the
22 experts before the jury comes in, otherwise, the jury
23 is going to hear a bunch of names about experts and
24 who they may be tied to or what they may be an expert
25 in. So I would just say, to the greatest extent

1 possible, that we identify those people before the
2 jury comes so they don't hear extraneous information.
3 Typically, when experts are in the courtroom they sit
4 in the back and no one gets to hear from them unless
5 they become witnesses.

6 THE COURT: What is the difference from
7 your standpoint? I agree with you, it sounds like
8 we're going to try and avoid having experts on the
9 telephone. What is your concern, if they're sitting
10 there quietly, how is that different than being in
11 the back behind Mr. Maynard?

12 MR. CASTELLANO: I see it as the same, but
13 typically, when they sit in the back, no one
14 identifies them or why they're in court. They're
15 only to give information and aid the defense, they
16 may not be there to actually testify. But the jury
17 hears some expert on some subject matter that person
18 never identified, speaking about someone outside in
19 the ozone. That's just information the jury doesn't
20 need to know, unless and until that witness becomes
21 relevant to the proceedings.

22 THE COURT: Let's do this: Unless somebody
23 comes back and reraises the issue, we will not have
24 an open telephone line with experts calling in on
25 "meet me" conference line. I won't deal with that

1 problem or work with that problem. If the defendants
2 want to reraise it, and think it's a solution, for
3 example, you don't get approval on dailies, or
4 something like that, then you can reapproach it. But
5 we'll take that issue off the table.

6 Now, can the Government live with
7 everything that I've sort of hammered out? Does that
8 give you the assurance to try to disclose some
9 information, any fine-tuning you want to do to the
10 agreement?

11 MR. CASTELLANO: I think that works fine,
12 Your Honor.

13 THE COURT: And you understand my
14 distinction that I'm not going to order you to do it?
15 But once we agree to it here, I will enforce it with
16 whatever powers I have.

17 MR. CASTELLANO: Yes, sir. That's
18 understood.

19 THE COURT: All right. Mr. Castle, then,
20 is there anything else on your motion that you think
21 I can do, or should do, or any other issues?

22 MR. CASTLE: No, Your Honor.

23 THE COURT: All right. So I will probably
24 not be granting that motion. But we've worked out
25 something that will try to help us get through the

1 trial.

2 All right. The next issue is Document
3 1502, which is the motion in limine regarding plea
4 agreements and addenda. I've not had a chance to
5 look at my Vigil opinion that was the subject of the
6 briefing. So, if anybody tells me I'm about to be
7 inconsistent here, please do. My memory was that I
8 didn't make a flat ruling on anything on that. But
9 correct me if I'm wrong. I guess my impression of
10 the plea agreements and addenda in this case is they
11 probably shouldn't come in, just whole hog, in the
12 sense that they'd just be admitted into evidence. It
13 seems to me they probably contain some hearsay, some
14 out of court statements being offered for the truth
15 of the matter, particularly, the defendant or
16 cooperators' statements of what occurred. That
17 probably needs to come in through the witness being
18 here and under oath and subject to cross-examination.

19 On the other hand, it is a contract, and
20 contracts do often come in for purposes of: There is
21 a contract. And it is not so important that the
22 terms be truthful. It's the fact that the parties
23 reached a contract. So I guess I'm wondering what we
24 can maybe agree to that should come in. It seemed to
25 me in the reply that I read today, came in over the

1 weekend, maybe offered us perhaps a starting point
2 that the defendants were suggesting what they could
3 live with is -- that I'm not sure I'm going to go the
4 Old Chief way, in the sense that, because the
5 defendants are willing to stipulate, that the
6 Government doesn't get to put in, maybe a redacted
7 plea agreement. But I'll listen to that.

8 But it does seem to me that probably what
9 ought to come in is going to be -- is going to be the
10 charges to which the informant pled, the sentencing
11 concessions, that section of the plea agreement,
12 whatever the informant has to do to secure those
13 concessions, which may be that he has to cooperate,
14 he or she has to cooperate, and testify truthfully,
15 and those sort of things. But that might be the
16 limit of what ought to come in.

17 Let me turn to you, Mr. Castle, Mr. Cooper,
18 since it's your motion. I know you don't like the
19 idea of a redacted plea agreement coming in. But it
20 seems to me that it's a contract, so some of the
21 terms probably are not hearsay. They're more in the
22 terms of this is what occurred, and the exchange of
23 those problems. Could you live with that redacted
24 plea agreement?

25 MR. CASTLE: Well, I actually attached a

1 copy of a plea agreement redacted, anticipated where
2 the Court might go, given its ruling in Vigil.

3 THE COURT: Tell me -- refresh my memory
4 what I did in Vigil.

5 MR. CASTLE: Well, Vigil, the Court allowed
6 the plea agreements in. But they were different
7 kinds of plea agreements. So one of them had no
8 recitation of the facts, another one had recitation
9 of the facts in which they implicated that weren't on
10 trial. So there wasn't the same issues, and the
11 Court didn't address confrontation at all.

12 Another argument that I thought of today,
13 flying to court, is that these witnesses are going to
14 be questioned what their agreement is. And then what
15 the Government wants to do is put the actual written
16 agreement in to support what the agreement was. And
17 when they do that, they're essentially -- it's a
18 prior consistent statement, but it really becomes
19 testimony by the informant in written form that the
20 jury takes back to the jury room.

21 THE COURT: Well, if we keep out the
22 statement of the facts, their version of events, tell
23 me -- I certainly understand that -- what else in the
24 agreement are you concerned about?

25 MR. CASTLE: Well, there is a portion of

1 the agreement where the Government indicates that
2 they believe that the -- or they're asserting the
3 defendant has clearly demonstrated --

4 THE COURT: Tell me what page you're on.

5 MR. CASTLE: Of the plea agreement, or --

6 THE COURT: Yes, the plea agreement.

7 MR. CASTLE: It would be page 5, paragraph
8 10. Unfortunately, that might be redacted on the
9 Court's copy, because I suggested a redaction. But
10 what it says is, "The defendants clearly demonstrate
11 the recognition of affirmative acceptance of personal
12 responsibilities for the defendant's criminal
13 conduct." That sentence, I believe, is an assertion
14 that both the United States and the defendant are
15 making, because --

16 THE COURT: I'm looking at page 5. But I'm
17 still not seeing it. Point to me where it is on page
18 5.

19 MR. CASTLE: It's paragraph 10.

20 THE COURT: Okay. Oh, okay.

21 MR. CASTLE: It's that first sentence, that
22 I believe is an assertion that both defendants and
23 the United States are making.

24 THE COURT: Do you want that sentence out?

25 MR. CASTLE: Yes.

1 THE COURT: All right. So you want that
2 out. You probably want 8 out, or at least the
3 statement of the facts there out?

4 MR. CASTLE: Yes.

5 THE COURT: What else are you worried
6 about?

7 MR. CASTLE: On page 3 of the plea
8 agreement, there is an indication of -- may I have a
9 moment? I'm floating between two documents here.

10 THE COURT: Are you thinking the sentencing
11 stuff ought to come out?

12 MR. CASTLE: No, I think the sentencing
13 information is relevant. But at the beginning of --
14 on page 3, paragraph 7D talks about the Court's role
15 in accepting or not accepting the plea agreement.
16 And I believe that that is going to be problematic,
17 because it almost indicates that in that situation --

18 THE COURT: That's the 801(d)(2)(A)
19 problem?

20 MR. CASTLE: Yes, exactly. And it's also
21 vouching. Because the agreement, obviously, was
22 already accepted. So it indicates there that the
23 Court --

24 THE COURT: Well, it's really not, because
25 they pled before a magistrate, they've accepted the

1 plea but not the plea agreement.

2 MR. CASTLE: I understand. But the jury is
3 not going to know that. So the jury is not going to
4 be steeped in that. What I am concerned about is
5 that they'll look at that, and they'll see the date
6 of the agreement. And there has been no rejection by
7 the Court; that to be interpreted as the Court's
8 approval of the plea agreement, and instead of having
9 us do cross-examination, have to go through a number
10 of hoops to say the Court hasn't agreed to it, where
11 the jury is going to be looking at Your Honor, and
12 wondering whether Your Honor has or hasn't, and
13 expecting the Court to say I've either accepted it or
14 haven't accepted it. Why do we need to put that in
15 here, when it can possibly be interpreted as -- even
16 if the parties don't invoke the imprimatur of the
17 Court, it has that appearance.

18 THE COURT: All right. What else?

19 MR. CASTLE: The only other aspect is I
20 believe we were objecting to the counsel for the
21 attestation, or I'm not sure what the word would be,
22 but the agreement on page at the end of the plea
23 agreement, the attestation on page 9 of the attorney
24 for the particular defendant witness.

25 THE COURT: Tell me what the problem with

1 that is.

2 MR. CASTLE: Well, it's his statement.
3 He's not testifying. And it's obviously a
4 testimonial statement that was made, it's a solemn
5 declaration.

6 THE COURT: So just take out the Gary
7 Mitchell here, his signature block, and paragraph to
8 which he attests?

9 MR. CASTLE: Yes.

10 THE COURT: What else?

11 MR. CASTLE: That's it, Your Honor. If the
12 Court doesn't buy my argument about the kind of being
13 super testimony, to just explain in a little more
14 detail.

15 THE COURT: Isn't what's going to happen is
16 you guys are going to impeach these guys with the
17 fact they've got a plea agreement? So probably
18 what's going to happen is the Government is going to
19 go first, and they're going to do most of the heavy
20 lifting for you, or because of you. And so they're
21 going to go into detail on this.

22 It's not -- this is me talking, you're the
23 defense lawyer -- but it's not a lot of vouching,
24 because it's coming in at the same time that they're
25 talking about it. It's not like they're going to

1 talk about it and then come back and support it with
2 the plea agreement. It's all coming in at the same
3 time. Here's the deal you got. Do you see much harm
4 with that?

5 MR. CASTLE: I don't see a lot.

6 THE COURT: Let me ask -- I haven't talked
7 to the Government at all here -- but if they can live
8 with these -- excising these portions of the plea
9 agreement and the addendums, can everybody live with
10 this, this much will come in, as a contract? Ms.
11 Duncan?

12 MS. DUNCAN: Your Honor, I have one other
13 paragraph I'd like to suggest for redaction, and that
14 would be on page of 6, paragraph 12. "The defendant
15 stipulates that he does not possess any exculpatory
16 information regarding any of his charged
17 co-defendants." That's really a legal conclusion.
18 And I don't think that that should be put in front of
19 the jury.

20 THE COURT: Okay. Anybody else? You could
21 live with these redactions that we've talked to Mr.
22 Castle and Ms. Duncan about?

23 MR. BENJAMIN: Your Honor, it's not so much
24 a redaction, as it was a confusion that happens, when
25 the Government listed the plea agreements that they

1 were going to use. And I was just going to -- I
2 guess we would object to any plea agreements as the
3 nontestifying defendants that have pled that are not
4 going to come in. The one specifically I'm thinking
5 of was Santos Gonzalez, because he was on a list --
6 part of what happened when I was not here and Mr.
7 Sindel was covering -- but I understand he was on a
8 list of people they're intending on using. And he
9 relates to Mr. Gallegos. It's just something I want
10 to raise with the Court.

11 THE COURT: I'm sorry, I'm not tracking
12 here. This would be a witness that is not
13 testifying, but they're bringing in his plea
14 agreement?

15 MR. BENJAMIN: His name was involved in
16 that. I don't know if that's been rectified or not.
17 But that's a concern, yes, Your Honor.

18 THE COURT: Of course, you can certainly
19 impeach somebody that's not here, if in another way
20 they're testifying in the court. Is he going to be
21 testifying in some way --

22 MR. BENJAMIN: No.

23 THE COURT: -- somehow that doesn't involve
24 him being in court?

25 MR. BENJAMIN: No, Your Honor. He's, my

1 understanding, out.

2 THE COURT: Remind me who he is?

3 MR. BENJAMIN: Santos Gonzalez, Ms. Erlinda
4 Johnson's client.

5 THE COURT: All right. Anybody else got
6 any candidates for redactions? Can you live with
7 this, if the Government can live with it?

8 All right. Mr. Castellano?

9 MR. CASTELLANO: Your Honor, I just wanted
10 to address the plea agreement regarding Santos
11 Gonzalez. He's not testifying. And I admitted all
12 the plea agreements in this case for purposes of the
13 James hearing, so that's for a different
14 consideration before the Court, not for trial
15 testimony. That included Conrad Villegas and Santos
16 Gonzalez, who are both not witnesses. It's for a
17 different determination before the Court.

18 MR. BENJAMIN: And, Your Honor, I
19 apologize. I was just nervous.

20 THE COURT: Well, but those portions of the
21 plea agreement, you would not be -- correct me if I'm
22 wrong -- you would not try to be bringing those in as
23 an out-of-court statement under the co-conspirator
24 exception, am I correct?

25 MR. CASTELLANO: That's correct, for trial

1 purposes. For purposes of the James hearing, we have
2 to establish the existence of a conspiracy.

3 THE COURT: All right.

4 MR. CASTELLANO: So it's to meet other
5 elements related to James.

6 THE COURT: All right. Okay. So does that
7 give you some comfort, Mr. Benjamin?

8 MR. BENJAMIN: It does, Your Honor.

9 THE COURT: Let me hear -- let me get Ms.
10 Sirignano before I turn this over completely to the
11 Government.

12 MS. SIRIGNANO: Your Honor, we're assuming
13 all these plea agreements have the same format;
14 correct?

15 THE COURT: Well, yeah, for purposes of
16 trying to do this. I know that there may be some
17 unique ones out there, but at least a box here,
18 seeing if we can hammer something out.

19 MS. SIRIGNANO: Thank you, Judge.

20 THE COURT: All right. Mr. Beck, do you
21 think you could live with these redactions? You get
22 the plea agreement in, but take out the portions that
23 the Court or defendants are most concerned about?

24 MR. BECK: So I think there is two answers.
25 Yes, but with the caveat that if something becomes

1 relevant during cross-examination. So I'm thinking,
2 you know, the factual basis --

3 THE COURT: I think you can still use those
4 to impeach: You know, haven't you told this Court
5 such-and-such. I think you can still impeach a
6 witness with a prior statement. So these things
7 don't go away.

8 MR. BECK: Well -- and I think they could
9 be admissible as prior consistent statements to rebut
10 the presumption that --

11 THE COURT: They might.

12 MR. BECK: -- that they said something
13 different.

14 So what I'm saying I think we can live with
15 those -- and I think we'll propose other redactions
16 with the sentencing provisions, and things like
17 that -- and I think that's fine as a starting off
18 basis. But I just -- I want the Court and everyone
19 to be aware that we may ask the Court to address that
20 based on what comes out in cross-examination.

21 THE COURT: Could everybody live with these
22 redactions, understanding that they may come in for
23 other purposes, if the Government lays some
24 foundation? But at least, when they're putting on a
25 witness, and they introduce the plea agreement, it

1 will have these redactions, at least these
2 redactions?

3 MR. CASTLE: Your Honor, we can live with
4 that. But I would ask that before the prosecution
5 attempted to bring in redacted portions, that that be
6 handled outside the presence of the jury, just
7 because someone might open the door to a particular
8 area of evidence, that's a theory of relevancy, it's
9 not a theory of necessarily admissibility that deals
10 with confrontation. So I can't imagine how -- even
11 if you could open the door to the Government's
12 statement that someone has provided substantial
13 assistance, it's still a confrontation issue that
14 needs to be dealt with. And so, just satisfying the
15 400 series doesn't necessarily satisfy the 800 series
16 or the Constitution. So I think what they're
17 proposing is that those are the right to reraise some
18 of these issues, but it would have to be outside
19 presence of the jury, in our opinion.

20 THE COURT: Can you agree that if you're
21 going to get into prior inconsistent statement, or
22 somehow the witness has opened this up, you'll just
23 approach the bench before you --

24 MR. BECK: We would certainly ask the Court
25 to allow us to do that before we intended to bring

1 that up in open court.

2 THE COURT: Okay. All right. Mr. Adams?

3 MR. ADAMS: Yes, sir.

4 Judge, I just have one matter to put on the
5 record about incorporating our midstream Miranda
6 motion from 4275. Is this a good time to do that, or
7 should I hold until tomorrow?

8 THE COURT: Refresh my memory what 4275 is.

9 MR. ADAMS: We had about a day-long
10 suppression motion. It was a three-hour statement by
11 Mr. Garcia upon his arrest. He was not Mirandized
12 for the first 16 minutes.

13 THE COURT: You're talking about, do you
14 want to move it into this case?

15 MR. ADAMS: Yes, sir.

16 THE COURT: I think you have a document
17 that does that, right?

18 MR. ADAMS: We referenced it. I have the
19 specific ECF numbers. I mean, I'm happy to do it
20 tomorrow morning.

21 THE COURT: I thought Ms. Sirignano had
22 filed a motion --

23 MR. ADAMS: She filed a motion. That
24 document wasn't specifically referenced. We
25 referenced it orally last week.

1 THE COURT: Let's do it tomorrow.

2 MR. ADAMS: Thank you.

3 THE COURT: Do we have an agreement then on
4 the plea agreements coming in and how they're going
5 to come in? Anybody disagree with it? All right.
6 So that's what -- hold on just a second.

7 THE CLERK: Judge?

8 THE COURT: Yes.

9 THE CLERK: Doc 1486 outlines the motion
10 number, and the 4275 for this case, you've seen it,
11 it's a notice.

12 THE COURT: Okay. Let me leave that for
13 tomorrow. Because I want to make a few comments
14 tonight.

15 So we're going to take up the bad acts
16 tomorrow. Let me ramble just a little bit. You'll
17 just have to accept this, think about it overnight.
18 I know everybody is working hard, but I'm a little
19 bit frustrated by the bad acts. It's like we're both
20 trains or something passing in the night here, and
21 people, I think, are being too formalistic here.

22 When I got the Government to list out the
23 bad acts, remember what we were doing. The
24 defendants were coming in and saying some of what
25 they're going to use to prove enterprise and

1 racketeering activity, and that sort of thing, is
2 going to be -- or in furtherance of the enterprise --
3 is going to be bad acts. We want to take a shot at
4 it, we just don't want to take their word for it.

5 So I told the Government to do their
6 traditional stuff, which is usually as a matter of
7 caution, they do a notice that says something to the
8 effect: Here's our 404(b); we don't agree with all
9 this being 404(b), but here's all the bad things
10 we're going to introduce.

11 And I was hoping that we would be able to
12 figure out a way for the Court to make a decision on
13 this. So I'm going to first fault the Government.
14 It seems to me you've got to tell me what you think
15 is 404(b) evidence. Because, if you do, you've got a
16 certain amount of proof that you've got to do for a
17 404(b). If you're saying that, okay, what we're
18 really doing is I want to use this information to
19 show enterprise and furtherance of the enterprise's
20 activity, then we go down a different path. And then
21 I've got to make kind of a relevance, and say it's in
22 that box. It's a res gestae type of argument. So I
23 think, on the letters that you send, you've got to
24 tell them more.

25 Defendants: I understand the Government

1 has to prove 404(b) to get it in, and the burden is
2 on them. But you've got to help them. I mean, you
3 can't just say: "The burden is on them." You've got
4 to start telling me what these events are. I mean, I
5 don't know about shoplifting and marijuana use, and
6 things like that. So you've got to help me here. I
7 think everybody is relying on a little bit of canned
8 briefing, formalized briefing, and everybody is
9 saying, Well, they've got the burden of proof. But
10 you've got to educate me. I can't make an informed
11 decision.

12 If you're not going to inform me, you're
13 not going to help me out here, I will go through and
14 I'll tell you what's in, what's out, based upon these
15 letters and upon the briefing. But it ain't much.
16 And, probably, people are not going to like the meat
17 cleaver approach that I'm going to take. So you've
18 got to educate me.

19 So think about it overnight, how you're
20 going to do that, and how you're going to do it
21 quickly. Are we going to do that in the morning?
22 Are we going to sit here and go through Christopher
23 Garcia's letter, and y'all educate me one by one, and
24 I make baseball calls all morning, and all day long?
25 That's fine, that's one way of doing it. If you've

1 got a different approach -- we've got to get it
2 going. Because I consider two things to be very
3 crucial for me to do my job, the thing that keeps me
4 awake, one is the 404(b) stuff, all this stuff coming
5 up first thing in the morning, how are we going to do
6 it so that we don't have a bunch of stuff coming into
7 the trial that doesn't advance the enterprise or
8 would not come under a 404(b) analysis.

9 It seems to me that these defendants have
10 enough things that they probably are going to not
11 like coming into trial, that's going to come in like
12 a freight train anyway, without talking about, you
13 know, parking tickets and shoplifting, and that sort
14 of stuff. And so we've got to get real here. So
15 help me get real, in the morning, how we're going to
16 do this.

17 The second thing is the James stuff, you
18 know, the James hearing. What statements are going
19 to come in as co-conspirator statements, and what
20 statements are going to come in and satisfy
21 Bruton/Smalls problems there?

22 Those are the two or three things that keep
23 me awake at night. So help me do those. I want to
24 do a good job. I don't want, you know, to have stuff
25 floating around that shouldn't be floating around in

1 this trial.

2 And, you know, at the same time, I don't
3 want to tell the Government how to try their case.
4 So I'm trying to balance those things.

5 All right. I appreciate your hard work --
6 no, got to go. Talk to me tomorrow.

7 Have a good evening. Appreciate it. Be
8 safe.

9 (The Court stood in recess.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492



MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

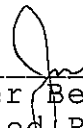
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on December 27, 2017.



Jennifer Bean, FAPR, RMR-RDR-CCR
Certified Realtime Reporter
United States Court Reporter
NM CCR #94
333 Lomas, Northwest
Albuquerque, New Mexico 87102
Phone: (505) 348-2283
Fax: (505) 843-9492

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

BEAN
& ASSOCIATES, Inc.
PROFESSIONAL COURT
REPORTING SERVICE

MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com